80-1135

No. .....

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HEDSTROM COMPANY, a subsidiary of
BROWN GROUP, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Dated: January 6, 1981

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The Petitioner, Hedstrom Company, (now incorporated as Hedstrom U.S.A., Inc.), a wholly owned subsidiary of Brown Group, Inc.,[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit *en banc* entered in this proceeding on October 8, 1980.

QUESTIONS PRESENTED

Whether issuance of a bargaining order in this case elevates "deterring employer misbehavior" over and at the expense of "effectuating ascertainable employee free choice" in the following respects:

1. Adoption of a rule that a threat to close or move a plant must be automatically remedied by a bargaining order ignores the necessity of assessing the threat's lingering effect upon a future election.

2. Consideration of intervening employer misbehavior without consideration of other subsequent changes in the work force and plant atmosphere fatally distorts the determination that the chances of employee free choice in a future election are slight.

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1. A list of subsidiaries and affiliates of Hedstrom is attached as Appendix F hereto.

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OPINION BELOW

The opinion of the Court of Appeals *en banc* regarding the consolidated National Labor Relations Board proceedings is reported at 629 F.2d 305 (3rd Cir. 1980 (6-3) and appears as Appendix A hereto. The decision and order of the Board regarding the subsequent unfair labor practice allegations is reported at 235 NLRB 1198 (1978), and is attached as Appendix B hereto. The supplemental decision and order of the Board on remand of the original unfair labor practice and bargaining order determinations is reported at 235 NLRB 1193 (1978), and is attached as Appendix C hereto. The opinion of the Court of Appeals remanding the original decision and order of the Board is reported at 558 F.2d 1137 (3rd Cir. 1977), and appears as Appendix D hereto. The original decision and order of the Board is reported at 223 NLRB 1409 (1976), and is attached as Appendix E hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit *en banc* was entered on October 8, 1980. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On February 21, 1974, the International Association of Machinists and Aerospace Workers, District No. 98 ("Union") filed a petition with the National Labor Relations Board ("Board") at Case No. 6-RC-6752, seeking certification as the collective bargaining representative of a 250 person unit of production and maintenance employees at Hedstrom Company's ("Hedstrom's" or "Company's") Bedford, Pennsylvania plant (A159).[2] On March 6, 1974, the Company and the Union entered into a consent election agreement setting up an election on March 28, 1974 (A159). At the election the employees voted against representation by the Union (A159). Subsequently, the Union filed objections to the election and an unfair labor practice charge.

A hearing was held before Administrative Law Judge Benjamin Blackburn, who issued his decision on November 19, 1975. Judge Blackburn found that there were grounds for setting the election aside, but rejected the General Counsel's argument that a bargaining order was warranted under the Category 2 criteria specified by this Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (A216).

On May 12, 1976, the Board reversed Judge Blackburn and held that a bargaining order was warranted under Category 2 *Gissel* standards (A147). The Board also rejected Judge Blackburn's conclusion that a March 16, 1974, conversation between E.L. "Jack" Ketcham, the Company's President, and Norman Anderson, an employee, was not violative of the Section 8(a)(1) of

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2. References to the Appendix hereto will be designated as (A .....), with appropriate page notations.

the National Labor Relations Act ("Act"), as amended, 29 U.S.C. § 158(a)(1) (1976). Additionally, the Board found that Hedstrom violated Section 8(a)(1) by refusing to recognize and bargain with the Union after it had acquired authorization cards from a majority of Hedstrom's employees (A155).

On May 14, 1976, two days after the Board had issued the bargaining order, the Union sent Hedstrom a letter demanding bargaining. On May 18, 1976, the Company responded that it desired to discuss the matter with its labor counsel and that it would notify the Union of its decision within 20 days. On June 14, 1976, the Union notified the Company that it would commence a strike against Hedstrom if the Company did not bargain immediately. On June 16, 1976, the Company notified the Union that it would seek judicial review of the bargaining order[3] and that it would not bargain with the Union in the interim. Thereafter the Union struck the Bedford plant to compel recognition. Picketing commenced on July 12, 1976, and the strike terminated on September 9, 1976 (A62).[4]

Upon the conclusion of the strike, all strikers were offered reinstatement, with the exception of Thomas Lewis, who had been discharged for picket line miscon-

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3. On June 1, 1976, Hedstrom filed its petition for review with the United States Court of Appeals for the Third Circuit.

4. Hedstrom suspended production operations until August 23, 1976, when 85 employees crossed picket lines and returned to work. On the next day, 125 employees returned to work. Thereafter, the size of the workforce increased. Only 130 of the 213 hourly employees of the Company remained away from work until the strike ended (A63).

duct.[5] Of those offered reinstatement, only Rena Ritchey, who held no Union office, refused to respond to recall. She was terminated. Although Ritchey had been aware that strikers were being recalled on a daily basis, she departed on an unauthorized vacation to New Jersey. Prior to departing, Ritchey told her son "Hedstrom might call, but don't worry about it."

The Union filed other unfair labor practice charges on August 30, 1976. On November 10, 1976, the General Counsel issued a complaint alleging that Hedstrom had violated Sections 8(a)(1), (3) and (5) of the Act (A59).

Before a Board decision regarding these subsequent unfair labor practice charges, however, the Third Circuit vacated the Board's previously issued bargaining order (A110). The Board's findings had been conclusory in nature, and the Board had failed "to clearly explicate its reasons for issuing a bargaining order and to include findings as to why a fair election cannot be held" (A136). In addition, Ketcham's March 16, 1974, conversation with Norman Anderson had not violated Section 8(a)(1), and there had been no violation of Section 8(a)(5). This was because the Union did not possess authorization cards from a majority of Hedstrom's employees when it demanded recognition on February 12, 1974 and the Union's demand for recognition was not a continuing demand. (A129). The court remanded the case to the Board (A141).

Beyond directing the Board to make the findings and analyses required by *Gissel,* the Third Circuit noted

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5. The Board subsequently held that Lewis had been properly discharged for serious misconduct (A52).

that the unfair labor practices "occurred over three years ago" and directed the Board to determine what effect the passage of time would have on the possibility of holding a fair rerun election (A140).

Shortly after the Third Circuit's remand, Administrative Law Judge Peter Donnelly issued his decision regarding the subsequent unfair labor practice charges on July 26, 1977 (A59). Timely exceptions to the decision were filed by Hedstrom and by the General Counsel. On April 28, 1978, the Board issued its Decision and Order. The Board found that:

(1) Hedstrom had violated Section 8(a)(1) on September 4, 1976, when Plant Manager William Griffiths coercively interrogated Rena Ritchey and solicited grievances from her (A82).

(2) Hedstrom had violated Section 8(a)(1) on September 11, 1976, when Foreman Clark Ferguson threatened Dolores Casteel with loss of her job and told her that the Company would never sign a contract with the Union (A81).

(3) Hedstrom had violated Section 8(a)(5) on September 14, 1976, by unilaterally promulgating certain work rules (A83).

(4) Hedstrom had violated Section 8(a)(1) on September 14, 1976 when President "Jack" Ketcham threatened Erma England with onerous working conditions because she had engaged in protected concerted activity (A55).

(5) Hedstrom had violated Section 8(a)(3) on September 17, 1976, when it refused to reinstate Rena Ritchey (A53).

On April 28, 1978, the Board also issued its Supplemental Decision and Order following remand. The Board reinstated the bargaining order it had issued on May 12, 1976 (A105). The Board relied, in part, on four unfair labor practices allegedly committed in September of 1976. The Board, however, held no further hearings nor made any other effort to comply with the circuit court's directive to ascertain whether the passage of time would affect the possibility of a fair rerun election.

Hedstrom filed a timely appeal. Both Board decisions were consolidated and scheduled for argument *en banc*. On August 6, 1980, the Third Circuit filed its opinion. With three judges dissenting, the circuit court determined:

(1) The record justified issuance of a bargaining order under the criteria established by this Court in *Gissel;* and

(2) There was substantial evidence to support the subsequent unfair labor practices found by the Board (A2).[6]

The judgment of the Third Circuit was entered on October 7, 1980, and this Petition For A Writ of Certiorari was filed on January 6, 1981.

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6. In this proceeding Hedstrom is only challenging the criteria used by the Board, and affirmed by the Third Circuit, to justify issuance of the bargaining order.

REASONS FOR GRANTING THE WRIT

1. The Decisions of the Board and Third Circuit Contravene The Analysis Previously Developed By This Court For The Issuance Of a Bargaining Order.

The Board found a bargaining order justified in this case under the criteria established by the Court in *NLRB v. Gissel Packing Co.*, 295 U.S. 575 (1969). The Board conceded that Hedstrom's conduct did not make this an "exceptional" case marked by "outrageous and pervasive unfair labor practices," *i.e.*, a *Gissel* Category 1 case. 395 U.S. at 613.

Instead the Board identified this as a *Gissel* Category 2 case described by this Court as follows:

> The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser *showing* of employer misconduct is appropriate, we should re-emphasize, where there is also a *showing* that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions *and the likelihood of their recurrence in the future.* If the Board *finds* that the possibility of erasing the effects of past practices

> and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

395 U.S. at 614-615 (emphasis added).

But finder-of-fact Administration Law Judge ("ALJ") Blackburn had previously declared that, apart from the threats of plant closure, all of the actions allegedly violative of Section 8(a)(1) of the Act were "trivial" and "do not rise to the level of the *Gissel* standard" (A216).

Likewise, ALJ Blackburn had found that the "implied" threat to close the plant did not "boost this proceeding into the Supreme Court's second category" (A216).[7] He, therefore, held that a bargaining order was not warranted or justified under the analysis developed by this Court.

The Board reversed the ALJ's determination by adopting a *per se* rule that threats of plant closure can only be remedied by a bargaining order. Following remand by the Third Circuit, the Board reinstated the bargaining order. Ignoring the fact that the threats to close were borderline at worst,[8] the Board, in conclusory

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7. The ALJ found that a fair rerun election was possible, in part, because the Union still polled 113 votes of the 133 authorization cards obtained. Thus, even assuming that everyone who signed a card initially would have voted for the union, the unfair labor practices "dissipated only 15 percent of the Union's majority" (A219).

8. The "threats" are described in detail *infra* at 10-11.

fashion, equated them with a no nonsense *promise* to close and held that the effect of a threat to close could never be dissipated by anything short of a bargaining order (A99-100).

The Board attempted to bolster its bargaining order decision by only considering subsequent unfair labor practice charges against Hedstrom and no other intervening circumstances. It did not assess the impact of the passage of time on the possibility of a fair rerun election.

The issuance of a bargaining order by the Board and the affirmance by the Third Circuit under these circumstances contravene the standards and rationale established by this Court in *Gissel,* as recognized by the finder-of-fact. A writ of certiorari is therefore needed to review this misapplication of the precedent of this Court.

2. The Board Ignored Its Own Precedent, As Approved By This Court, By Mandating Issuance Of A Bargaining Order When A Threat Of Plant Closure Occurs.

Here the Board adopted, and the Third Circuit approved, a *de facto per se* rule that a bargaining order is the only remedy for a threat of plant closure (A99-100, 10). In so doing, the Board ignored its own precedent that cease and desist orders, rather than bargaining orders, are adequate remedies for threats of plant closure during election campaigns. *E.g., Allen-Stone Boxes, Inc.,* 252 NLRB No. 171, 105 LRRM 1381 (1980); *Coach and Equipment Sales Corp.,* 228 NLRB 440 (1977); *Florida Steel Corp.,* 223 NLRB 174 (1976); *Reeves Dis-*

tribution Services, Inc., 223 NLRB 995 (1976); *Ludwig Motor Co.*, 222 NLRB 635 (1976).

Other than this case, the Board has never adopted a *per se* rule that the commission of any unfair labor practice will automatically result in the issuance of a bargaining order, as this Court noted in *Gissel*, 395 U.S. at 615. Such an approach would certainly contravene *Gissel's* requirement that the Board must assess the possibility of holding a fair rerun election in Category 2 cases.

Adopting such a rule here is particularly egregious given the circumstances. The threats of plant closure here were blown totally out of proportion by the Board and the six judge majority of the Third Circuit. The record shows that the "veiled threats" of plant closure consisted of the following incidents during the course of a seven week campaign in a 250 person bargaining unit:

(1) On March 1, 1971, Plant Manager William Griffiths approached *one* employee, Brandt, and asked him what he thought about the Union. When Brandt replied that he had not made up his mind, Griffiths stated that "the building would not be worth much without the Company" (A179).

(2) Foreman Reheault told *one* employee, Whetstone, that "the Union stifled the growth of the Company in Massachusetts" (A193).

(3) Foreman Beland told *one* employee, Greaser, that "the Union [in Fitchburg] had been no good and a Union would do the employees no good in Bedford" (A201).

(4) Ketcham's 26 page "election eve" speech to all employees contained a passing reference to the Company's "unhappy experience" in Fitchburg (A166).

To further bloster this weak record of threats of plant closure, the Board, on remand, improperly considered the impact of an editorial which appeared in the *Bedford Gazette* on the day of the election.[9] It was never alleged, however, that publication of the editorial constituted a violation of Section 8(a)(1) of the Act by Hedstrom nor did the Board find such a violation.[10]

Moreover, although the Board has occasionally ordered new elections due to third party interference, *Universal Manufacturing Corp.*, 156 NLRB 1459 (1966), the Board has never before predicated the issuance of a bargaining order on conduct by a third party for which the employer was not responsible under agency principles. There was no such finding here.

The Board, therefore, ignored its own precedent, as approved by this Court, and, by extension, ignored the *Gissel* principles in issuing a bargaining order in this case. The grant of a writ of certiorari is necessary to correct this deviance from the principles outlined in *Gissel.*

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9. The record revealed that the editorial had little potential impact since a union poll of approximately one-third of the eligible voters revealed that 69.5% of those polled did not read the article or could not recall reading it.

10. The complaint concerning the editorial was contained in the 1974 election objections. Election objections—as contrasted with an unfair labor practice—can be used only as grounds for a new election, not a bargaining order.

3. The Decision Of The Third Circuit Conflicts With The Decisions Of Other Circuit Courts As To The Subsequent Events Which The Board Must Consider In Issuing A Bargaining Order.

The Board made no attempt here to comply with the *Gissel* analysis and determine whether a fair rerun election could be held. On remand, the Board only considered the subsequent unfair labor practices allegedly committed by Hedstrom. Those allegations were already conveniently matters of record before the Board[11]

No effort was made, however, to ascertain critical factors such as plant expansion, employee turnover, and the general impact of the passage of time which would indicate that there was no "lingering effect" to the alleged unfair labor practices.[12]

The majority of the Third Circuit *en banc* that the Board gave "careful consideration to the record on re-

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11 Those subsequent unfair labor practice violations, described *supra* at 5, amount to only three one-on-one conversations found to be violations of Section 8(a)(1) of the Act; a violation of Section 8(a)(5) which is, of course, premised on the existence of a valid bargaining order which Hedstrom continues to dispute; and a violation of Section 8(a)(3) regarding the discharge of Rena Ritchey, which the three judge dissenting opinion declared did not provide "the slightest evidentiary value to support the Board's inability to conduct a fair election" (A39).

12. Such evidence would show that there has been more than 44% turnover among employees who voted in the election, and plant expansion has increased the labor force from 249 to 355 employees. Additionally, it would show that the Bedford plant has been expanded from 320,000 to 450,000 square feet, perhaps the most tangible "evidence" to a prospective voter that plant closure is highly unlikely.

mand," and it was not necessary for the Board "to conduct a further hearing or to adduce additional evidence" (A16).[13]

As noted by Judge Rosenn (joined by Judge Weis and Judge Garth) in the dissenting opinion, however, the remand was no more than a sham:

> [T]he record does not show the composition of the work force four to five years later. How many of the present work force knew of the previous threats? What is there in this record to show that the employees retain any fears that would affect their ability to freely cast a ballot in a second election conducted by the Board? (A32-33).

By affirming the refusal of the Board to consider the relevance of the passage of time on factors such as plant population and atmosphere, the Third Circuit contravened the decisions of virtually every other circuit court. *NLRB v. Jamaica Towing, Inc.*, ... F.2d ....., 105 LRRM 2959 (2d Cir. 1980); *General Steel Products, Inc. v. NLRB*, 445 F.2d 1350 (4th Cir. 1971); *NLRB v.*

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13. The majority opinion of the court *en banc* also criticized Hedstrom for not offering such evidence to the Board *ex parte* or filing a motion for reconsideration following the remand (A15). Such an action would have been futile in light of the Board's explicit position that such evidence is irrelevant and will not be considered. *E.g., American Cable Systems, Inc.*, 179 NLRB 846 n. 3 (1969), *remanded*, 427 F.2d 446 (5th Cir. 1979); *Armcor Industries, Inc.*, 227 NLRB 1543, 1545 (1977), *enforcement denied*, ... F.2d ....., 98 LRRM 2441 (3rd Cir. 1978). During oral argument the Board conceded that such an act would have been futile, and the law does not require the exhaustion of a futile procedure. *Smith v. Pittsburgh Gage and Supply Co.*, 464 F.2d 870, 875 (3rd Cir. 1972).

American Cable Systems, Inc., 427 F.2d 446 (5th Cir. 1970), *cert. denied*, 400 U.S. 957 (1971); *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108 (7th Cir. 1973); *NLRB v. Dixisteel Buildings, Inc.*, 445 F.2d 1260, (8th Cir. 1971); *L'Eggs Products, Inc. v. NLRB*, ... F.2d ....., 104 LRRM 2674 (9th Cir. 1980); *NLRB v. Ship Shape Maintenance Co., Inc.*, 474 F.2d 434 (D.C. Cir. 1972). *Cf., GPD, Inc. v. NLRB*, 430 F.2d 963 (6th Cir. 1970).

The basis for all these decisions evolves from a clear recognition that a free election is the preferred method for selection of a collective bargaining representative. As the dissenting opinion in this case stressed, the object of the Board's inquiry is not merely to punish Hedstrom for its conduct but to assess the *present* atmosphere to determine whether a free choice by the employees is possible (A 33). The majority of the Third Circuit ignored these fundamental principles recognized by nearly every other circuit court.

This conflict justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 78-1800 and 78-1801

HEDSTROM COMPANY, a subsidiary of
BROWN GROUP, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF ORDERS OF THE
NATIONAL LABOR RELATIONS BOARD

Nos. 6-CA-7619 and 6-RC-6762

Argued June 5, 1979
Argued In Banc April 28, 1980

Before: SEITZ, *Chief Judge,*
ALDISERT, ADAMS, GIBBONS, ROSENN, WEIS, GARTH,
HIBBINBOTHAM and SLOVITER, *Circuit Judges*

(Filed August 6, 1980)

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OPINION OF THE COURT

ADAMS, *Circuit Judge.*

These cases are before us on the consolidated petitions of Hedstrom Company, a subsidiary of Brown Group, Inc., to review and set aside two orders issued against it by the National Labor Relations Board and on a cross-petition by the Board for enforcement of its orders. Two principal issues are presented. First, is the Board's reinstatement of its remedial order of May 12, 1976 that directs Hedstrom to recognize and bargain with the International Association of Machinists and Aerospace Workers (the Union), entered in response to a remand from this Court, within its broad discretion to effectuate the policies of the National Labor Relations Act? Second, is there substantial evidence on the record to support the findings by the Board that Hedstrom committed additional unfair labor practices during a strike at the Company's plant in 1976? We conclude in No. 78-1800 that, under the circumstances of this case, enforcement of the bargaining order should not be denied, and in No. 78-1801 that the record does support the findings of unfair labor practices.

I.

Hedstrom Company manufactures toys and furniture. In early 1974, a union organization campaign was waged at the Company's plant located in Bedford, Pennsylvania. As a result of the campaign, signed authorization cards were obtained from a majority of the plant employees, and on March 28, 1974, an election was held, which the Union lost by a vote of 125 to 113. A number of complaints of unfair labor practices by management personnel were then filed by the Union with the National Labor Relations Board. Following the usual practice,

the Board assigned the matter to an Administrative Law Judge (ALJ) for a hearing. The ALJ thereafter filed an opinion on November 19, 1975, finding 42 separate violations of §8(a)(1) and a single violation of §8(a)(5) of the National Labor Relations Act, and recommended that the election be set aside and a cease and desist order issue.

After exceptions were filed, the Board affirmed the ALJ's findings of numerous unfair labor practices. Specifically, the Board determined that Plant Manager William Griffiths and nine plant supervisors coercively and unlawfully interrogated employees, solicited employee grievances, promised and granted benefits to employees, conveyed impressions of employee surveillance, and threatened employees with discharge, plant closure, reduced benefits, and more onerous work rules, in an attempt to interfere with protected employee organizational rights. In addition, the Board found that, immediately preceding the election, Company President Lee Ketcham impliedly threatened the employees with plant closure by declaring that the Company had undergone an "unhappy experience" with the Union at its former plant, and that this implied threat was reinforced by a local newspaper editorial on the day of the election stating that Hedstrom's "bitter experience" with the Union at its former plant had caused the closure of that plant by the Company. Finally, the Board determined that Ketcham unlawfully threatened an employee with discharge and that the Company violated §8(a)(5) of the Act by refusing to recognize and bargain with the Union. Because it found that the numerous and pervasive violations committed by the Company undermined the Union's support and rendered slight the possibility of conducting a fair second election, the Board also di-

rected Hedstrom to recognize and bargain with the Union.

On Hedstrom's petition for review of the Board's initial order, a panel of this Court on July 5, 1977, affirmed all of the Board's findings of unfair labor practices except the findings that President Ketcham unlawfully threatened an employee with discharge and that the Company unlawfully refused to recognize and bargain with the Union.[1] Partly because of its reversal of these two unfair labor practice findings, but primarily because the Board failed to make "specific findings" regarding the immediate and residual effect of the unfair labor practices and a "detailed analysis" assessing the likelihood of holding a fair re-run election, this Court declined to enforce the Board's order to bargain and remanded the case to the Board for review in light of our rulings. In particular, the prior panel instructed the Board to evaluate the effect of the reversal of the two unfair labor practice findings; to assess the impact on both the election and the chance for a fair rerun election of the front page editorial warning that Hedstrom might move its plant in the event of unionization; and to consider what effect the passage of time would have on the possibility of having a fair second election.

After these events, chronicled in detail in the prior opinion, a labor strike was called at the Hedstrom plant during the summer of 1976 that resulted in several incidents involving company representatives and certain employees. Complaints of additional unfair labor practices arising out of these subsequent episodes were filed with the Board, and the ALJ conducted a further hear-

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1. *Hedstrom Company v. NLRB (Hedstrom I)*, 558 F.2d 1137 (3d Cir. 1977).

ing. Following the filing of exceptions to the recommendations of the ALJ on the part of both Hedstrom and the General Counsel, the Board affirmed the findings of the ALJ that Hedstrom had committed additional unfair labor practices. In particular, the Board determined that Hedstrom violated §8(a)(1) when William Griffiths coercively interrogated Rena Ritchey and solicited grievances from her; when President Ketcham threatened Erma England with onerous working conditions because she had engaged in protected concerted activity; and when Clark Ferguson threatened Delores Casteel with loss of her job and told her that Hedstrom would never sign a contract with the Union. Additionally, the Board found that Hedstrom violated §8(a)(3) and (1) by refusing to provide Rena Ritchey an offer of reinstatement with a reasonable time for her to respond. Finally, the Board decided that Hedstrom violated §8(a)(5) by refusing to bargain with the Union and by unilaterally promulgating certain new work rules.

As a result of these findings, the Board ordered the Company to cease and desist from engaging in the unfair labor practices found and from in any other manner interfering with, restraining, or coercing employees in the exercise of their rights under the Act. Affirmatively, the Board ordered Hedstrom to offer Rena Ritchey reinstatement and to make her whole for any loss of pay she may have suffered as a consequence of the discrimination practiced against her. The Board's order also required the Company to rescind the work rules that had been unilaterally promulgated, and to post appropriate notices at its facility.

In a separate proceeding, conducted in response to the remand, the Board reconsidered its initial order that

directed Hedstrom to bargain with the Union. Relying in part on its findings that Hedstrom had committed subsequent unfair labor practices by coercively interrogating and threatening its employees, as well as on its review of the record in light of the opinion in *Hedstrom I,* the Board filed a supplementary decision and reinstated its original bargaining order. Hedstrom then petitioned this Court to review and set aside both the supplemental order requiring Hedstrom to bargain with the Union, as well as the separate order relating to the subsequent unfair labor practice findings. The Board cross-applied for enforcement of both orders.

II.

The focal point for decisional analysis of the law pertaining to bargaining orders is the Supreme Court's discussion in *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969). In *Gissel,* the Court declared that a bargaining order may appropriately be imposed in place of a new election not only in cases involving outrageous conduct, but also in other than extraordinary cases that are "marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process." 695 U.S. at 614-15. The Board's authority to issue a bargaining order on a lesser showing of employer misconduct is appropriate when there is also a showing that at one point the union had the support of a majority of employees. In such a case, a bargaining order serves both to effectuate ascertained employee free choice and to deter employer misconduct. Indeed, the Supreme Court emphasized in *Gissel* that once it has been shown that the union has achieved majority status, "effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior." 395 U.S. at 614-615.

> In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of easing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, through present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue. . . .

Id.

Because *Gissel* expressly delimits the circumstances in which an order to bargain may be appropriately entered, this Court has required the Board to provide, "at the very least, a statement of the reasons leading the administrative agency to impose a bargaining order." *Kenworth Trucks of Philadelphia v. NLRB,* 580 F.2d 55, 61 (3d Cir. 1978). The primary purpose undergirding this requirement is to assist a reviewing court in determining whether the standards of *Gissel* have been satisfied.[2] Since the propriety of a bargaining order depends

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2. As a general matter, the NLRB must disclose the foundation of its orders. See *NLRB v. Metropolitan Life Insurance Co.,* 380 U.S. 438, 443 (1965); *Kenworth Trucks of Philadelphia v. NLRB,* 580 F.2d 55, 61 n. 4 (3d Cir. 1978). Section 8(b) of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), provides that decisions by administrative agencies must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record. . . ."

In addition to promoting the aim of ensuring informed judicial review of the board's bargaining orders,

upon the existence of certain circumstances, it is fitting for the board to "explain with specificity the results of the unfair labor practices and, in particular, the unlikelihood of a fair election," *NLRB v. Craw*, 565 F.2d 1267, 1272 (3d Cir. 1977), before seeking enforcement of such an order. This is not to say, of course, that a reasoned elaboration of the basis for a bargaining order by itself will assure that a careful weighing of the evidence has occurred, but only that it should help to further such an aim.[3]

The requirement of a reasoned analysis setting forth the factors justifying the imposition of a bargaining order, however, was meant neither to burden the Board, nor to "limit the issuance of bargaining orders whenever necessary." *NLRB v. Armcor Industries, Inc.*, 535 F.2d at 245. We have emphasized repeatedly that, "an elaborate explanation of the factors giving rise to the conclusion that a bargaining order is needed is not essential." *Kenworth Trucks of Philadelphia v. NLRB*, 580 F.2d at 60. Rather, it is expected only that the Board "estimate the impact [of the unfair labor practices], taking into account the factors in the particular case which are indicative of actual effect or which plausibly,

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the requirement of a statement of reasons also has been said to contribute to the "predictability of this important area of labor law" and to provide a "prophylaxis against arbitrary exercise of the Board's power." *NLRB v. Armcor Industries, Inc.*, 535 F.2d 239, 245 (3d Cir. 1976). *See, Kenworth Trucks of Philadelphia v. NLRB*, 580 F.2d 55, 60 (3d Cir. 1978); *NLRB v. Craw*, 565 F.2d 1267, 1271 (3d Cir. 1977); *NLRB v. Eagle Material Handling Co.*, 558 F.2d 160, 167 (3d Cir. 1977).

3. See Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1292 (1975) ("The necessity for justification is a powerful preventive of wrong decisions.")

in the light of existing knowledge, would contribute to or detract from an actual impact," and appraise "those factors which might reasonably have a bearing on the likelihood of a fair rerun election. *Peerless of America, Inc. v. NLRB,* 484 F.2d 1108, 1118 n.16 (7th Cir. 1973), *quoted in Kenworth Trucks of Philadelphia v. NLRB,* 580 F.2d at 60, and *NLRB v. Craw,* 565 F.2d at 1271, and *NLRB v. Armcor Industries, Inc.,* 535 F.2d at 245.

On the original petition for review of the Board's order to bargain, this Court determined that, because it "did not indicate the reasons it concluded a fair election unlikely, nor did it assess the past history of employee interference," 558 F.2d at 1151 n.35, the Board's reasoning in support of its order was unduly conclusory. Accordingly, the case was remanded to the Board for an explication of the factors justifying the issuance of the bargaining order. In particular, the Board was instructed to evaluate the effect of the reversal of the two unfair labor practice findings; to assess the impact on both the election and the possibility for a fair rerun election of the front page newspaper editorial warning that Hedstrom might move its plant in the event of unionization; and to consider what effect the passage of time would have on the likelihood that a fair second election would ensure a fair election.

In compliance with the order of remand, the Board reconsidered the record as a whole in light of the requirements enunciated in *Gissel* and set forth in the opinion on the initial appeal. Despite the reversal of two of the unfair labor practice findings, the Board found that Hedstrom's extensive anti-union campaign, together with the large number of remaining unfair labor practices, demonstrated the company's proclivity to ex-

ceed the limits of the law in its attempt to prevent unionization.[4] From these findings, the Board specifically inferred that "the total effect of the threats of closure, and the numerous other unfair labor practices against the background of the general awareness of the [Company's previous labor] experience, was to instill in employees a strong fear of loss of employment that

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4. In this regard, the Board made the following specific findings:

> With respect to the seriousness of [the Company's] unfair labor practices and the impact one might reasonably expect them to have had on employees, we note at the outset that the possibility of plant closure in the face of unionization was an issue which loomed large in the election campaign. The Board has long held that the threat of job loss through plant closure has a seriously coercive effect on employees' freedom of choice in the election of a collective bargaining representative. Thus, the Board has stated: "Threats of loss of work and income are a type of threat likely to have the most substantial impact upon employee attitudes and reactions." [Citation omitted.]
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> . . . Further, in *Gissel* . . . the Supreme Court recognized the serious impact of such threats when it made reference to a study which showed that threats to close or transfer plant operations were more effective in destroying election conditions for a longer period of time than were other types of unfair labor practices. [Citation omitted.]
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> [The Company's] employees were exposed to the threat of plant closure throughout the campaign. The entire Bedford community was aware that [the Company] had recently closed the Fitchburg plant due to the presence of a union. [B]oth high- and low-level supervisors unlawfully raised the Fitchburg example to the employees during the campaign, and impliedly threatened Bedford employees with the same fate in the event that they selected the

would continue to be operative even in the event of a second election." The Board further ascertained, in assessing the impact of the publication on the chance of a fair rerun election, that publication of the editorial could only have exacerbated the employees' fears.[5] In the Board's view, this was particularly so because prev-

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> Union. Indeed, [the Company's]president, Ketcham, ended the campaign with a speech to all employees which raised the spectre of the "unhappy experience" at Fitchburg.
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> . . . In addition, the Company's intensive anti-union campaign included approximately 40 unfair labor practices, demonstrating the Company's willingness to exceed the limits of the law in its attempt to prevent unionization.

5. The article in question entitled "Hedstrom Employees to Vote today on Unionization," appeared on the front page of the Bedford Gazette the day of the election, and contained the following statements:

> Hedstrom, which was sold to Brown Group, Inc., of St. Louis two years ago, has its headquarters in Bedford. Hedstrom's largest production facility is in Dothan, Ala. The headquarters shift from Fitchburg, Mass., to Bedford, was made to escape what management felt was an untenable union relationship. "A bitter experience," one said. The Hedstroms left Fitchburg—and the union—behind.
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> * * * *
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> The real issue in the election may be the company's expansion plans. Company officials confirm that the parent corporation, Brown Group, has approved a $1 million addition to the massive plant along Sunnyside Road. . . .
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> * * * *
>
> Hedstrom President E. Lee (Jack) Ketcham told Bedford Rotary a month ago that "It's Bedford's turn to grow." Ketcham said most of the growth in recent years had been at the Dothan, Ala. plant, which is not unionized.

ious acts by the company lent credibility to the warning set forth in the editorial.[6]

The Board, in its opinion, recognized its responsibility under *Gissel* to "attempt to measure the impact [of such conduct] over time and, also, to assess the likelihood that any lasting impact can be mitigated by remedies short of an order to bargain." The Board noted in this regard that "[m]erely requiring the employer to refrain from repeating such threats will not, of course, erase the threat from the employees' memory." Further, the Board observed that "the standard remedy for less severe violations—the posting of a notice informing employees that the employer will not repeat his unlawful conduct—often prolongs that impact by insuring that each and every employee is reminded that such a threat was made." In compliance with the dictate of the Supreme Court in *Gissel,* the Board then concluded expressly that "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies,

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When—or if—the expansion will be made could hinge on the union situation, but company officials wouldn't say that. One officer said, "We've all been too busy on this election to think about it."

6. After reviewing the article in accordance with our instructions, the Board made the following specific findings:

As to the newspaper article which the court has instructed us to consider, it appeared on the morning of the election and recounted the Fitchburg experience and suggested that the Company's expansion plans might be adversely affected by the presence of a union on the scene. Thus, the fears engendered by the implied threats of company officials and supervisors were articulated in an article published by an independent source. This article

though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order. . . ." 395 U.S. at 614-15

Finally, in conformity with the instructions set forth by the Court on the prior appeal, the Board considered the effect of the passage of time on the possibility of a fair second election. In this regard, the Board found nothing in the record to indicate any diminution in the employees concern that they would lose their jobs should the Union win an election. To the contrary, the Board determined that the effects of Hedstrom's earlier threats of plant closure were subsequently reinforced by the commission of additional unfair labor practice violations, found by the Board in the companion case."[R]ecent events," the Board declared, "indicate that respondent's vigorous opposition to the Union continues to result in unfair labor practices, thereby sustaining, reinforcing, or increasing the fear that the company might still carry out its earlier threat to close operations if the Union prevails." Subsequent unfair labor practices, as Judge Wisdom has recently stated for the Court of Appeals for the Fifth Circuit, "are always relevant because they demonstrate that the employer is still opposed to unionization." *Chromalloy Mining and Minerals, Etc. v. NLRB,* No. 78-3410, slip op. at 7205 n.8 (5th Cir., July 10, 1980). For this reason, consideration of such events by the Board in determining whether to

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would tend to reinforce the employees' belief that [the Company's] threats were not merely campaign rhetoric, but serious admonitions regarding the consequences of unionization [footnote omitted].

impose a bargaining order has been approved by the courts.[7]

On the basis of these specific findings and after careful consideration of the record on remand, the Board concluded that a bargaining order was still necessary to protect the rights of Hedstrom's employees. The Board possesses "broad discretion to adapt its remedies to the needs of particular situations," in order to effectuate the policies of the Act. *Local 60, United Brotherhood of Carpenters v. NLRB,* 582 F.2d 720, 740 (3d Cir. 1978). And the Supreme Court has made it clear that it is within the province of the Board to determine whether a bargaining order would better protect the interests of employees in a particular case than would an election. As the Court instructed in *Gissel*:

> It is for the Board and not the courts . . . to make that determination, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the broad provisions of §10(c) of the Act . . . the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.

395 U.S. at 612 n.32.

In our view, this appeal has all of the elements that, as we reiterated only recently, are common to those cases in which we have enforced orders to bargain. *Electrical Products Division of Midland-Ross v. NLRB,* 617

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7. *See e.g.,* Chromalloy Mining and Minerals, Etc. v. NLRB, No. 78-3410, slip. op. at 7205 n.8 (5th Cir., July 10, 1980); *NLRB v. Drives, Inc.,* 440 F.2d 354, 367 (7th Cir.) *cert. denied* 404 U.S. 912 (1971).

F.2d 977, 987 (3d Cir. 1980); *Rapid Manufacturing Co. v. NLRB,* 612 F.2d 144, 149-50 (3d Cir. 1979). To begin with, the implied threats at issue were communicated to a "significant percentage of employees in the bargaining unit." *Midland-Ross,* 617 F.2d at 987; *Rapid Manufacturing,* 612 F.2d at 149. Indeed, Company President Ketcham's implied threat of plant closure was made at a meeting involving every Hedstrom employee. Moreover, the unfair labor practices at issue "involved unlawful activity by senior company officials." *Midland-Ross,* 617 F.2d at 987, *id.; Rapid Manufacturing,* 612 F.2d at 149. And, because the findings rest "ultimately on a psychological impact on all the employees that is unlikely to dissipate, the factors undermining the first election would be present at any future election." *Midland-Ross,* 617 F.2d at 987. In addition, the imposition of a bargaining order has been held "especially appropriate" where, as here, "the employer has demonstrated a history of opposition to unionization, thus suggesting that he will commit more unfair labor practices in a subsequent election campaign, and . . . the employer has engaged in a discriminatory refusal to recall an employee, thus indicating that his anti-union animus is responsible at least in part for the employee turnover." *Chromalloy Mining and Minerals, Etc. v. NLRB,* No. 78-3410, slip op. at 7207 (5th Cir. July 10, 1980).

Although Hedstrom, in its argument before us, faults the Board for not taking additional testimony or requesting statements of positions or briefs from counsel on remand, the Company itself proffered no evidence, no statements, nor additional briefs in the more than nine months that the case was pending before the Board after this Court's remand on July 5, 1977. Nor did the Company move for reconsideration or for leave to ad-

duce additional evidence after the Board issued its decision on remand on April 28, 1978, as permitted by Board Rules and Regulations. 29 CFR §102.48(d)(1). Under the circumstances, we find that Hedstrom is thus precluded from asserting this objection on appeal. 29 U.S.C. §160(e); *see International Ladies' Garment Workers v. Quality Manufacturing Co.,* 420 U.S. 276, 281 n.3 (1975); *Glaziers' Local No. 558 v. NLRB,* 408 F.2d 197, 202-03 (D.C. Cir. 1969).

Hedstrom I merely instructed the Board to consider on remand what effect the passage of time would have on the possibility of having a fair second election. Nothing in the order imposed upon the Board any obligation to conduct a further hearing or to adduce additional evidence. Indeed, to require the Board to determine whether a continuing majority supports unionization would be "to put a premium upon continued litigation by the employer." *NLRB v. L. B. Foster Company,* 418 F.2d 1, 4 (9th Cir. 1969). For an employer, particularly one with a rapid turnover rate, could hope that the resulting delay would produce a new factual situation which the Board would then have to consider. In this manner, the employer would be able to avoid any bargaining obligation indefinitely.[8]

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8. Moreover, as Judge Wisdom recently put it, "the union would assume the role of Sisyphus, condemned in Hades continually to roll a stone up a hill only to find that it slides down again before reaching the top." *Chromalloy Mining and Minerals, Etc., v. NLRB,* No. 78-3410, slip op. at 7207 (5th Cir. July 10, 1980).

Although substantial employee turnover may well be relevant to the Board's choice of remedy, "the Board may determine that other considerations, such as 'past union activity, employer responses to such activity, and

Appendix A.

An additional argument sometimes raised against bargaining orders is that their issuance deprives employees of their right to vote and forces them into unions contrary to their own wishes. Opponents thus assert that it is the employees who are the real victims of such orders to bargain. "In the last analysis, however," as one scholar has observed, "those who would resist this remedy in the name of the employees must answer for the employees whose free choice is currently impaired by the lack of adequate remedies."[9] On occasion, traditional remedies, such as the posting of notices or the possibility of reinstatement with back pay, will not allay adequately worker apprehensions of workers caused by the employer's flagrant unfair labor practices. Such fears may undermine majority strength and, as a result, union elections may be lost or postponed for substantial periods of time pending litigation. To the extent that an order to bargain will help to deter the Commission of such unfair practices, "there is good reason to believe that the net effect [will] be to

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expressions of employee sentiment such as the signing of union cards," . . . requires the imposition of a bargaining order even when substantial turnover has occurred." *Id.* (quoting in part *Bandag, Inc. v. NLRB,* 583 F.2d 765, 773 (5th Cir. 1978).

9. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act,* 78 Harv. L. Rev. 38, 135 (1964). Moreover, as then Professor Bok pointed out, the Board's order to bargain will not necessarily compel the employees to join the union or pay dues unless a union security clause is negotiated. However, "[a]n employer who will violate the law to resist unionization is an unlikely prospect for a union security clause, and it will be difficult to pressure him into making this concession when the majority of employees are opposed. . . . Still more important, there is every reason for the union

promote, and not impair, the legitimate interests of employees as a whole."[10]

There is no dispute in this case that the Union at one time enjoyed the support of the majority of the employees, as evidenced by signed authorization cards. And while the dissent's position may represent a reasonable view of the record, we cannot say that the Board's factual determinations in this regard are not supported by substantial evidence. Recognizing that "it is not our function to substitute our judgment for the Board's on the propriety of a bargaining order," *NLRB v. Armcor Industries, Inc.*, 535 F.2d at 245, we hold that these determinations constitute a sufficient showing of employer misconduct, under the circumstances, so as to render the imposition of a bargaining order not inappropriate. Hence, we will deny the petition for review and enforce the order of the Board that the Company recognize and bargain with the Union upon request.

III.

In the related proceeding, the Board found that Hedstrom had committed additional violations of §8(a)(1) by coercively interrogating Rena Ritchey regarding her union activities, by threatening Erma England with onerous working conditions in retaliation for her assistance to the Union, and by threatening Delores Casteel with loss of employment because of her active union support.

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to negotiate a contract that will satisfy the majority, for the union will surely realize that it must win the support of the employees, in the face of a hostile employer, in order to survive the threat of a decertification election after a year has passed." *Id.* at 136.

10. *Id.* at 136.

According to the principles set forth in *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951), the scope of an appellate court's review of the Board's findings regarding unfair labor practices is limited to the determination whether the findings are supported by substantial evidence on the record as a whole. "Substantial evidence" has been defined by the Supreme Court as simply "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[11] A court should defer to the Board's determination under this restrictive standard of review, even when the court itself would be inclined to adopt a different interpretation of the evidence.

To a significant extent, such deference reflects a judicial recognition of the NLRB's role as an agency "presumably equipped or informed by experience to deal with a specialized field of knowledge." *Universal Camera Corp. v. NLRB,* 340 U.S. at 488.[12] But judicial deference to factual determinations rendered by the Board is not limited to those areas peculiarly within the Board's

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11. *Consolo v. Federal Maritime Commission,* 383 U.S. 617, 620 (1966) (quoting *Consolidated Edison Co., v. NLRB,* 305 U.S. 197, 229 (1938)).

12. *See, e.g., Unemployment Compensation Commission v. Aragon,* 329 U.S. 143, 153 (1946).

The assumption that the NLRB possesses a special expertise to determine the impact of employer conduct on the exercise of employee rights has been criticized. *See, e.g.,* Getman and Goldberg, *The Myth of Labor Board Expertise,* 39 U. Chi. L. Rev. 681 (1972); Samoff, *NLRB Elections: Uncertainty and Certainty,* 117 U. Pa. L. Rev. 228 (1968). We had occasion only recently, however, to reemphasize our obligation to accord deference to the presumed expertise and experience of the Labor Board in the area of unfair labor practices. *Dow Chemical Company v. U.S.E.P.A.,* 605 F.2d 673, 681 (3d Cir. 1979).

competence. Congress specilically provided that: "[T]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 29 U.S.C. §160(e) (1976). And the Supreme Court has expressly instructed that, "[e]ven as to matters not requiring expertise," an appellate tribunal may not "displace the Board's choice between two fairly conflicting views" of the evidence, although "the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB,* 340 U.S. at 488.

In light of these principles, and after considering all of the evidence bearing upon the additional charges of unfair labor practices on the part of Hedstrom, we have concluded that the Board's findings should not be disturbed.

Section 8(a)(1) prohibits an employer from interfering with, restraining, or coercing its employees in the exercise of protected concerted activities. To establish a violation of this provision, "it need only be shown that 'under the circumstances existing, [the employer's conduct] may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.' "[13] It is well settled that an employer breaches §8(a)(1) by interrogating employees about their union sympathies, when doing so suggests to the employees that the employer may retaliate because of those sympa-

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13. *NLRB v. Armcor Industries, Inc.,* 535 F.2d at 242 (quoting *Local 542, International Union of Operating Engineers v. NLRB,* 328 F.2d 850, 852-53 (3d Cir. 1964), cert. denied, 379 U.S. 826 (1964)).

thies.[14] It is equally well settled that an express or implied promise to remedy the grievance if the Union is rejected, also constitutes a transgression of §8(a)(1).[15]

The record in this proceeding shows that Hedstrom's plant manager, William Griffiths, approached Ritchey, a union member and striker, and asked her if she knew the purpose of the scheduled union meeting. When Ritchey answered that she did not, Griffiths proceeded to question Ritchey regarding her "problems in the factory." In response to the grievance solicited from Ritchey that the employees had no one with whom they could discuss problems in confidence, Griffiths promised that such matters would "be handled differently" by the company's "new personnel."

This exchange occurred during a discussion of the employee's union activities. Moreover, it took place in a context that included previous coercive interrogatories of employees regarding union activities and previous solicitations by company officials for the purpose of inducing employees to abandon such activities. Given the absence of any attempt by the company to offer a legitimate explanation of its interest in discovering the reason for the union meeting, as well as the lack of any assurance that Hedstrom would not retaliate against Ritchey because of her union activities, we find that there is substantial evidence to support the Board's find-

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14. *Hedstrom Co. v. NLRB, Hedstrom I,* 558 F.2d at 1143, n.13; *NLRB v. Armcor Industries, Inc.,* 535 F.2d at 242.

15. *Hedstrom Co. v. NLRB, Hedstrom I,* 558 F.2d at 1142 n.12; *Landis Tool Co., Div. of Litton Industries v. NLRB,* 460 F.2d 23, 24-25 (3d Cir. 1972), cert. denied, 409 U.S. 915 (1972).

ing that Griffiths' conversation with Ritchey amounted to a violation of §8(a)(1).

As to the finding that Hedstrom abridged §8(a)(1) by threatening England, the record attests that Hedstrom's president, Lee Ketcham, viewed England as an active striker who had exhibited "a very foul mouth" during the strike. On the day the striking employees returned to work, Ketcham accused England of having "harassed an awful lot" of her fellow workers, reiterated to her the company's work rules, and emphatically told her that she should "stay in [her] work area." The ALJ concluded that Ketcham's remarks were designed not to threaten England but rather to reduce the possibility of friction in the plant. The Board declined to adopt this finding, however, and determined instead that, under the circumstances, Ketcham's actions violated §8(a)(1) because they conveyed the message that Hedstrom "viewed England as a troublemaker and would enforce the work rules more stringently against her than against other employees."

The dissent would hold that because "the General Counsel lodged no exception to the ALJ's finding about the alleged threat to England," the Board lacked the authority to review this issue. Yet the very first exception taken by the General Counsel was to the ALJ's finding that Hedstrom "did not violate §8(a)(3) and (1) of the Act" by its actions toward England.[16] Even if this ex-

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16. The consolidated complaint issued by the General Counsel alleged that Hedstrom separately violated §8(a)(1) by threatening Erma England with onerous working conditions and §8(a)(3) by imposing such onerous working conditions on her. Only the finding of the 8(a)(1) violation is at issue here.

ception were perceived as not complying with the requirements set forth in the regulations,[17] however, this would not preclude the Board from reviewing the issue raised. It would simply permit the Board, in its discretion to disregard the matter.[18]

Even assuming *arguendo* that the General Counsel did not take a proper exception to the finding in question, we nonetheless differ from the position taken by the dissent that the statute and the Board's own regulations dictate that unless an exception to a finding of the ALJ is filed, the finding is final and cannot be reversed by the Board. Section 10(c) does state that "if no exceptions are specifically filed, "the ALJ's recommended order shall become the order of the Board."[19] But the immediately succeeding subsection expressly provides that "[u]ntil the record in a case shall have been filed in a court, . . . the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside in whole or in part, any finding or order

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17. 29 C.F.R. §102.46(b) (1978) provides in part:

(b) Each exception (1) shall set forth specifically the questions of procedure, fact, law, or policy to which exceptions are taken; (2) shall identify that part of the administrative law judge's decision to which objection is made; (3) shall designate by precise citation of page the portions of the record relied upon; and (4) shall state the grounds for the exceptions and shall include the citation of authorities unless set forth in a supporting brief.

18. 28 C.F.R. §102.46(b) (1978) provides further: Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

19. 28 U.S.C. §160(c) (1976).

made or issued by it."[20] To construe these provisions as foreclosing the Board from reviewing its own findings, or those of the ALJ, at least in a case such as this in which the issue in question has been placed before the Board in connection with the exceptions taken to other aspects of the ALJ's decision, would be to circumvent their literal meaning and unduly to constrain the board in its administration of the Act.

Nor do we believe that the Board's review and reversal of the ALJ's finding was prohibited by the Board's own regulation that "[n]o matter not included in exceptions or cross-exceptions may thereafter be argued before the Board."[21] We adhere, instead, to the approach espoused by the Fifth Circuit that "[e]ven absent an exception, the Board is not compelled to act as a mere rubber stamp for its Examiner,"[22] at least not when the issue has been placed before the Board, as it was here. Thus "[t]he Board was free to use its own reasoning and was not bound by that of the Examiner."[23]

Nor is the Board in any way inhibited by inferences drawn by the ALJ. To the contrary, the authority to draw legitimate inferences from proven facts is exclusively the Board's, not the ALJ's or the court on review of the Board's order. Indeed, we have consistently held that "the Board has the power to draw different conclusions from evidentiary facts" presented to the ALJ, including conclusions that directly contradict those reached by the

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20. 28 U.S.C. §160(d) (1976).

21. 29 C.F.R. §102.46(8) (1978).

22. *NLRB v. WTVJ, Inc.*, 268 F.2d 346, 348 (5th Cir. 1959).

23. *Id.*

ALJ. *NLRB v. Local No. 42, Int. Ass'n of Heat and F.I.A. Workers,* 469 F.2d 163, 165 (3d Cir. 1972); *accord, International Union of Elec. Radio and Machine Workers v. NLRB,* 273 F.2d 243, 247 (3d Cir. 1959). If more than one inference may be drawn from a given set of facts, therefore, the conclusion of the Board will control unless it is unreasonable. Because we cannot say that the inference drawn by the Board—that Ketcham's actions "conveyed the message that Hedstrom viewed England as a troublemaker and would enforce its work rules more stringently against her than against other employees"—is any less reasonable than that drawn by the ALJ, we will enforce this finding of the Board.

Similarly, we also find substantial evidence to support the determination that Hedstrom committed an additional abridgement of §8(a)(1) by threatening Delores Casteel with loss of employment because of her union activities. The record shows that Clark Ferguson, a company supervisor, accosted Delores Casteel, a union committee member and striker, in a bar. After calling Casteel "a scab," Ferguson told her that she would "have no job" if she sought to return to the plant, and that she and her fellow employees would "never get a contract" with the company.

It is firmly established that an employer commits a violation of §8(a)(1) by threatening employees with discharge because of union activities[24] or by indicating to employees that their union activity will not succeed.[25] And the dissent readily concedes that Ferguson's state-

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24. *See, e.g., NLRB v. S.E. Nichols - Dover, Inc.,* 414 F.2d 561, 563 (3d Cir.), cert. denied, 397 U.S. 916 (1968).

25. *See, e.g., NLRB v. Sky Wolf Sales,* 470 F.2d 827, 803-31 (9th Cir. 1972).

ments, if "taken alone, . . . could well be viewed as threatening an employee with discharge and tending to emphasize futility in union activity." Nonetheless, the dissent would decline to enforce the Board's conclusion that Ferguson's actions constituted an unfair labor practice, in part, apparently, because Casteel was not coerced by Ferguson's statements. "The test of coercion and intimidation," however, as our Court has frequently stated, "is not whether the misconduct proves effective [but] whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees. . . ."[26]

In support of its position, the dissent relies additionally on Casteel's own testimony that she told Ferguson that he was drunk and that he didn't know what he was talking about. As we see it, however, these observations do not justify the substitution, for the inference drawn by the Board, of the dissent's own inference that this was simply "an isolated personal barroom exchange between company employees with sharply different views." Rather, we believe, these two positions represent fairly conflicting interpretations of the evidence. Under the applicable standard of review, we are therefore obliged to defer to the Board's determination despite the dissent's inclination to draw a different conclusion from the evidence.

In addition, we will enforce that portion of the Board's order finding that Hedstrom violated §8(a)(3) by refusing to reinstate Rena Ritchey and requiring

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26. *NLRB v. Triangle Publications, Inc.*, 500 F.2d 597, 598 (3d Cir. 1974) (quoting *Local 542, Operating Engineers v. NLRB*, 328 F.2d 850, 852-53 (3d Cir.), *cert. denied*, 379 U.S. 826 (1964)).

Hedstrom to make Ritchey whole for the loss of pay suffered as a result of Hedstrom's discrimination against her. The Board concluded that following the termination of the strike, Ritchey was entitled to receive a valid offer of reinstatement from Hedstrom. The Board determined further that Hedstrom violated the Act by failing to provide Ritchey an offer of reinstatement with a reasonable time for her to respond. Consequently, it ordered that Hedstrom reinstate Ritchey and compensate her for the loss of pay resulting from that violation.

Section 10(c) of the Act expressly authorizes the Board "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer . . . responsible for the discrimination suffered by him."[27] Moreover, it is settled that the purpose of a back pay order is to vindicate the public policy embodied in the Act and to deter further encroachments on the labor laws by making employees whole for losses suffered on account of an unfair labor practice.[28] Accordingly, we hold that the back pay order was not an inappropriate exercise of the Board's legitimate authority.

Finally, we conclude that there is also substantial evidence in the record to support the Board's determination that Hedstrom violated §8(a)(5) and (1) by refusing to bargain with the Union and by unilaterally promulgating new work rules. Section 8(a)(5) of the

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27. 29 U.S.C. §160(c) (1976).

28. *See, e.g., NLRB v. Dodson's Market, Inc.,* 553 F.2d 617 (9th Cir. 1977); *NLRB v. Frick Co.,* 397 F.2d 956 (3d Cir. 1968).

Act prohibits an employer from refusing to bargain with the designated collective bargaining representative of its employees.[29] That an employer violates §8(a)(5) and (1) if he makes announcements concerning work conditions which contain material changes from existing conditions without consulting with the employees' bargaining representative is well established. *NLRB v. Katz,* 369 U.S. 736, 743 (1962); *Marine & Shipbuilding Workers v. NLRB,* 320 F.2d 615, 620 (3d Cir.), cert. denied, 375 U.S. 984 (1963). In addition, an employer violates §8(a)(5) and (1) if he makes announcements concerning work conditions which, even if they do not contain material changes from existing conditions, are designed by their timing and wording to undermine the employees' bargaining representative. *Flambeau Plastics Corp. v. NLRB,* 401 F.2d 128, 134 (3d Cir.), cert. denied, 393 U.S. 1019 (1968); *NLRB v. George P. Pilling & Son Co.,* 119 F.2d 32, 38 (3d Cir. 1941). Whether an employer's announcements concerning work conditions are violative of §8(a)(5) because they either contain material changes from existing conditions or are designed to undermine the employees' bargaining representative, is a question of fact for the Board and its determination is binding on a reviewing court if supported by substantial evidence. *NLRB v. George P. Pilling & Son Co.,* 119 F.2d at 33.

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29. Section 8(a)(5) provides that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees." "To bargain collectively" is defined by §8(d) as "the performance of the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ."

Appendix A.

The original order requiring Hedstrom, upon request, to recognize and bargain with the Union with respect to wages, hours, and other terms and conditions of employment was issued on May 17, 1976. Shortly thereafter, the Union officially demanded recognition and requested that Hedstrom bargain with the Union as the employees' exclusive collective bargaining representative. Subsequently, on June 16, 1976, the Company formally rejected the Union's request, and on September 13, 1976, it promulgated certain work rules pertaining to the terms and conditions of employment, without notifying or consulting with the Union.

Hedstrom argues against this charge that these alleged new work rules merely reiterated certain rules that were already in existence. But while the existing rules simply stated that all employees "are required to be at their work place . . . at starting times and remain there until times of ending work," the new rules specifically stated that all employees "without exception must be at their assigned work stations except for: (a) authorized rest periods; (b) lunch period; [and] (c) "personal needs when permission has been requested of and granted by your supervisor" and that " '[w]andering' around the plant, congregating at vending machine areas and . . . in rest rooms at other than these allocated times are prohibited." Moreover, unlike the existing rules which allowed all of the employees to take their coffee breaks at the same time, the new rules required the employees to take their coffee breaks on a staggered department-by-department basis to "reduce . . . congestion that occurs at the vending machines and rest areas during break periods." Furthermore, the record shows that while the company previously had often neglected to enforce this and other rules and failed to

state what disciplinary measures it would use to enforce the rules, the new rules contained language not present in the prior rules to the effect that the company would enforce the new rules "immediately" and that it would use disciplinary measures, "including discharge," in doing so.

The Board affirmed the ALJ's finding that these new rules did not merely reiterate prior rules, but instead contained "obvious and substantial differences." In our view, substantial evidence on the record supports this determination. We also find substantial evidence to support the finding that the promulgation of these new rules was designed to undermine the Union. The rules were announced to the employees just as the strikers returned from the strike caused by the Company's refusal to bargain with the Union. And the announcement itself explicitly stated that the new work rules were designed to counter the effect of "sharply divided opinions and attitudes" associated with efforts by employees to support the Union on the need for "a safe and orderly place of work." Under these circumstances, the inference drawn by the Board that promulgation of the rules was designed to undermine support for the Union does not seem unreasonable.

Assuming *arguendo* that it did unilaterally promulgate new work rules, the Company contends alternatively that such action would not constitute a violation of §8(a)(5) because the bargaining order then in effect was subsequently set aside by this Court. In reinstating its order in compliance with our instructions on remand, however, the Board specifically designated February 15, 1974, the day on which the Union achieved majority status and the eleventh day after the Company began its unfair labor practices, as the effective date of Hed-

strom's obligation to bargain. Only recently, we reaffirmed that the Board may properly make a bargaining order retroactive to a date on which the Union had achieved majority status and by which the unfair labor practices which give rise to order had begun. *NLRB v. Daybreak Lodge Nursing & Convalescent Home, Inc.*, 585 F.2d 79, 82-83 (3d Cir. 1978); *accord, NLRB v. Eagle Material Handling, Inc.*, 558 F.2d 160, 170 (3d Cir. 1977). Accordingly, we hold that Hedstrom's unilateral promulgation of the new work rules subsequent to February 15, 1974, the effective date of its obligation to bargain with the Union, did constitute a §8(a)(5) violation.[30]

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30. "That the employer did not originally understand the full consequences of its illegal acts," as we stated in *NLRB v. Daybreak Lodge Nursing & Convalescent Home, Inc.*, 585 F.2d at 83, "does not prevent the issuing of a bargaining order and should not, we believe, prevent that order from being made effective as of the date here." In this case, however, since a valid bargaining order, albeit one that was subsequently vacated, was in effect at the time of the promulgation of the new work rules, it would seem that Hedstrom is precluded from offering this argument.

Appendix A.

IV.

Hedstrom's consolidated petitions for review will be denied, and the orders of the Board will be enforced.

ROSENN, *Circuit Judge,* Dissenting.

The majority opinion, under the rubric of judicial deference, approves of the imposition of a bargaining order without a shred of evidence that a rerun election is impractical. Because I believe that the Board's order lacks a reasonable basis in law and is unsupported by substantial evidence, I respectfully dissent.[1]

The Board's explanation for the extraordinary remedy of a bargaining order is unacceptable because it is not predicated upon factual determinations but is structured upon speculation built on speculation. For example, the Board concludes, without any factual evidence to support the conclusion, that the total effect of threats of plant closure during the campaign "was to instill in employees a strong fear of loss of employment that would continue to be operative in the event of a second election." This is speculation of the highest rank because (1) there is no real evidence that a substantial portion of the work force was affected by "strong fears of the loss of employment" engendered by management threats, and (2) the record does not show the composition of the work force four to five years later. How many of the present work force knew of the previous threats? What is there in this record to show that the

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1. As for the subsidiary issue of the reinstatement of Ritchey with back pay, I concur with the majority. I disagree with the majority's enforcement of the remaining unfair labor practices.

employees retain any fears that would affect their ability to freely cast a ballot in a second election conducted by the Board?

The Board apparently believed it was properly punishing the company for engaging in unfair labor practices. Such a simplistic approach, however, ignores the fact that the real victims of the bargaining order are the employees. The employees, many of whom were not in the work force during the election, are being punished for they are being deprived of their right to vote and they are being represented by a bargaining agent they may not desire. I believe the majority errs when it "defers" to alleged Board "expertise" under the facts of this case.

I.

Over six years ago, on March 28, 1974, a representation election was conducted for the employees of Hedstrom. Following the election which the Union lost by a vote of 125 to 113, unfair labor practice charges were lodged against the employer. After an NLRB administrative law judge ("ALJ") held hearings on the campaign and election, he concluded that the company had committed unfair labor practices and that the election should be set aside. Although noting that the company had threatened to close the plant if the Union won, the ALJ evidently viewed Hedstrom's transgressions as "numerous" but not major. The ALJ rejected the contention that the unfair labor practices warranted a bargaining order. Having heard the testimony of the witnesses, he concluded that the employer's unfair labor practices could be remedied by an appropriate cease-and-desist order and were not so serious as to preclude a board supervised rerun election.

The Board cursorily reversed the ALJ's decision and issued a bargaining order. In granting that order, the Board relied on *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). According to that decision, once a Union enjoys the support of a majority of employees as indicated by authorization cards, and unfair labor practices by the employer undermine this majority and leave only a slight chance for a fair rerun of the election, the Board may order the employer to bargain with the Union. *Id.* at 614.

When we first reviewed the bargaining order issued to Hedstrom, we remanded for an explanation of the specific reasons why a new election could not be held. *Hedstrom Co. v. NLRB,* 558 F.2d 1137 (3d Cir. 1977). *See NLRB v. Armcor Industries, Inc.,* 535 F.2d 239 (3d Cir. 1976). Further proceedings before the ALJ and the Board followed. However, the Board did not take additional testimony; it did not request position statements or briefs from counsel on remand. In April 1978 the Board found that Hedstrom had committed additional unfair labor practices since the first bargaining order. Referring to the original violations and the subsequent unfair labor practices, the Board proceeded to draft an explanation for its second bargaining order. The principal issue now before this court is the sufficiency of that explanation.

II.

The justification advanced by the Board must be examined in light of the paramount principle that the preferable way to measure employees' support for a union is by secret election. Otherwise a union, unwanted by either the employer or the employees, may be foisted

upon a company. Although *Gissel* approves the Board's resort to authorization cards as a gauge under limited circumstances, the opinion leaves no doubt that, when possible, an election should be held. 395 U.S. at 603-04. This preference for the elections is a cornerstone of labor relations. Elections permit employees to express their personal preferences by secret ballot in the highly critical determination as to who, if anyone, will exclusively represent them in collective bargaining. The secrecy of the ballot most effectively wards off the pressures created by the advocates for and the opponents of the union; it insulates employees from intimidation by either union organizers or the company. The relative formality of an election, supervised by NLRB agents, as contrasted with the informal solicitation of authorization cards, and whatever unknown representations are made in the process, may impress employees as to the seriousness of their choice and the necessity for deliberation. After a campaign in which both the union and the company debate the merits of unionization, employees can make a more informed choice than when they informally sign authorization cards based solely on union representation. Authorization cards are not foolproof and their solicitations are not always free from misrepresentation or pressure. It is the independent, deliberate, secret, and informed choice of employees—the choice made in an election—to which the Board should, whenever possible, give effect.

> [D]emocracy in industry must be based upon the same principles as democracy in government. Majority rule, with all its imperfections, is the protection of workers' rights, just as it is the surest guaranty of political liberty that mankind has yet discovered.

Senator Robert Wagner paraphrasing Lloyd K. Garrison, former chairman, National Labor Relations Board, 79 Cong. Rec. 7571 (1935).

Judged in light of the preference for elections, the Board's bargaining order in this case is a misapplication of *Gissel* and is unsupported by substantial evidence. Under *Gissel,* as interpreted by this court in *NLRB v. Armcor Industries, Inc., supra* the Board may issue a bargaining order here only if unfair labor practices have so corrupted conditions at the Hedstrom plant that, even with the passage of time, a fair election could not be held. The Board attempts to satisfy this standard by the following argument: in 1974 Hedstrom committed unfair labor practices that precluded a fair election then, and because of subsequent unfair labor practices "the passage of time has not increased the likelihood that a fair second election can be held." As the Board wrote in its Supplemental Decision and Order,

> . . . [T]he effect of [Hedstrom's] threats of plant closure and its extensive unfair labor practices during the course of the campaign was to instill in employees the fear that they would lose their jobs through plant closure if the Union won the election. There is nothing to indicate that this fear has been erased during the past 3 years. To the contrary, recent events indicate [Hedstrom's] vigorous opposition to the Union continues to result in unfair labor practices, thereby sustaining, reinforcing, or increasing the fear that the Company might still carry out its earlier threat to close operations if the Union prevails.

As I have already indicated, this is sheer speculation. The facts do not substantiate this argument. I doubt

that the record in this case shows that a new election could not have been conducted in 1974; it certainly does not show that a fair election was precluded when the bargaining order was issued in 1978.

As the ALJ recognized in his decision concerning the 1974 violations, Hedstrom's unfair labor practices were numerous. With the exception of the threat to close the plant, however, the violations were not, in his view, "extensive" in terms of their weight and effect. He concluded that even the threat of closure did not preclude a fair election:

> Here, the Union obtained 133 authorization cards. It polled 113 votes. Thus, even if the assumptions are made that all 133 persons who placed their names on the Union's authorization cards did so because they wanted representation and that all 20 of those who changed their minds were coerced into doing so by [Hedstrom's] unfair labor practices, [Hedstrom] dissipated only 15 percent of the Union's majority. The impact of unfair labor practices of such limited effectiveness is not sufficiently lingering to justify a finding "that the possibility of erasing the effects . . . and ensuring a fair . . . rerun . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order."

(Footnote omitted quoting *NLRB v. Gissel Packing Co., supra* 395 U.S. at 614-15.)

In neither its original decision nor its opinion after remand has the Board answered these persuasive find-

ings.[2] On the basis of the Board's failure to repudiate the findings of the ALJ, there is serious doubt that Hedstrom's violations would have prevented a fair re-run election, even in 1974.

In view of this doubt, what is for me decisive is the Board's failure to point to actual evidence rather than mere speculation that the effects from the 1974 violations continued to afflict Hedstrom's employees when the Board issued its second opinion in 1978. The Board rested its conclusion on additional unfair labor practices which it found Hedstrom had committed since 1974. I turn to these alleged violations.

The Board specifically pointed to four unfair labor practices which it said had taken place since 1974 and had continued the effects of the 1974 violations: (1) the discharge of Rena Ritchey; (2) the interrogation of Ritchey; (3) the incident involving Clark Ferguson and Delores Casteel; and (4) the threat that Erma England would be assigned more burdensome conditions for work.[3] I agree with Judge Adams that we should

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2. Although our standard of review is not altered when the Board reaches a conclusion different from that reached by the ALJ, the Supreme Court in Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951), has noted that evidence supporting the Board's conclusion may be viewed as being "less substantial" in such circumstances. NLRB v. PPG Industries, 579 F.2d 1057, 1058 (7th Cir. 1978).

3. The majority also alludes to a fifth violation found by the Board: Hedstrom had allegedly promulgated new work rules without consulting the Union. But the Board did not cite that violation as support for the bargaining order. Furthermore, in the absence of a collective bargaining agreement or valid bargaining order at the time, there was nothing to preclude the company

sustain the finding concerning the discharge of Ritchey, ordering reinstatement with back pay. However, there is nothing whatever in her discharge which has the slightest evidentiary value to support the Board's inability to conduct a fair election. Her discharge grew out of a failure on her part to respond to a recall to work following a work stoppage. I disagree with the majority's enforcement of the Board's findings as to the incident involving Ferguson and Casteel and believe that the Board's finding about a threat to England is also insupportable.

Two nights after the strike was called off, a minor company supervisor, Clark Ferguson, encountered Delores Casteel, a Union employee, in a bar. Ferguson, who obviously had been drinking heavily, called Casteel "a scab," told her the Union would never get a contract and concluded by saying that she "had no job." Taken alone, this language could well be viewed as threatening an employee with discharge and tending to emphasize futility in Union activity. *NLRB v. Varo, Inc.*, 425 F.2d 293 (299) (5th Cir. 1970). However, in context, it is clear that Casteel did not labor under any threat of discharge from Ferguson's drunken remarks and that Ferguson acted in excess of his authority. It is conceded that Casteel knew that Ferguson was drunk; that he was not her supervisor or in any way connected with company employment policy; that she did have a job, because that same afternoon she had been called back to work by a company official; and, finally, that Fergu-

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from adopting such work rules—rules which were substantially similar to those which had been in existence for many years.

son was so drunk he did not know what he was talking about.[4]

Under the circumstances, I can find no substantial evidence supporting a conclusion that Casteel was in any way coerced, nor in any way threatened in a manner tending to discourage Union activity. I view the Ferguson-Casteel incident as an isolated, personal barroom exchange between company employees with sharply different views. The company was completely divorced from complicity for this barroom incident and should not be held responsible. Accordingly, I would reverse the finding of the Board in this respect.

As for the alleged threat to England, the ALJ found that the conversation was not coercive. Both section 10(c) of the Labor-Management Relations Act and the Board's own regulations dictate that unless an exception to a finding of the ALJ is filed, the finding is final and cannot be reviewed by the Board. 29 U.S.C. §160(c) (1976); 29 C.F.R. §§102.46(h), 102.48(a) (1978). Although the General Counsel lodged no exception to the ALJ's finding about the alleged threat to England, the Board overturned that finding and determined the conversation violated section 8(a)(1). In taking this action, the Board disregarded both the statute and its own regulations, which vouchsafe to parties appearing before it a full opportunity to be heard on questions that the Board is deciding. Even if the statute were not implicated, the rules afford procedural rights, which the Board may not ignore. *See Morton v. Ruiz,* 415 U.S. 199,

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4. I think I (Casteel) said "You're drunk and you don't know what you're saying." "***because *if he wouldn't have been drunk, I don't think he would have been saying it.*" (Emphasis added.)

235 (1974). I would therefore hold that the alleged threat to England was not within the authority of the Board to consider. *See NLRB v. International Union of Operating Engineers, Local 66,* 357 F.2d 841, 845-46 (3d Cir. 1966).

Pared of its insupportable findings of fact, the Board's conclusion of lingering effects rests on the questioning of one employee, Ritchey, and her later discharge under circumstances indicating her own partial fault. I do not discern any warrant for the Board's conclusion that these two events have sustained since 1974 the taint of the original unfair labor practices in such a degree that even now an election cannot be held. As the ALJ demonstrated, the 1974 unfair labor practices eroded, at the most, 15 percent of the Union's majority. Without more, I fail to perceive how the interrogation and discharge of this employee, herself partially at fault, provides substantial evidence for the view that the effects of Hedstrom's violations had not sufficiently abated to allow a fair election by 1978.

This case is not unlike *L'Eggs Products Inc. v. NLRB,* No. 78-2387 (9th Cir. 1980), where the employer allegedly engaged in threatening activities prior to a Union election. The Union lost the election and filed charges of unfair labor practices. The ALJ found that the company's "campaign against the Union included coercive interrogations of employees [and] threats of more onerous working conditions . . . ." The Board affirmed the findings and imposed a bargaining order. The Ninth Circuit, in ordering the Board to reconsider the bargaining order, concluded that the discharge of two employees could not provide the sole basis for the Board's order.

In this case the Board has not attempted to assess how the interrogation and discharge of Ritchey—even the other alleged unfair practices—could possibly interfere with the freedom of choice of employees in a Board-supervised, secret election. Indeed, no possible effect could be perceived. The ALJ made an assessment and reached a negative conclusion. The Board's conclusion on the necessity for a bargaining order is not grounded on the evidence but on sheer unsupported conjecture. In criticizing the reliance on assumptions underlying the Board's regulation of campaign tactics, Judge Skelly Wright, writing for the D.C. Circuit, observed that the Board was suffering

> from the obvious self-justifying tendency of an institution which in over 30 years has itself never engaged in the kind of much needed systematic empirical effort to determine the dynamics of an election campaign or the type of conduct which actually has a coercive impact. The public interest need for such an empirical investigation into the assumptions underlying the Board's regulation of campaign tactics has for some time been recognized by labor law scholars.

Getman v. NLRB, 450 F.2d 670, 675-76 (D.C. Cir. 1971) (footnotes omitted).

The majority finds support for the imposition of the bargaining order in *Electrical Products Division of Midland-Ross v. NLRB,* 617 F.2d 977 (3d Cir. 1980). I believe *Midland-Ross* involved a much different factual context and is easily distinguished from this case. In *Midland-Ross* the Company announced to all employees only two days before the election that it was closing one of its plants because of unprofitability. The Company

then stated its belief that unionization leads to lower profitability. The clear implication of the Company's statement was that a Union victory could mean an eventual plant shutdown. The shutdown of the other plant lent credence to management threats. In this case there was no other plant shutdown. Unlike the record in *Midland-Ross, supra, id.* at 987, there is no evidence whatsoever that Hedstrom's workers presently fear any closedown because of unionization.

The crucial facts of this case bear considerable similarity to those in *Rapid Manufacturing Co. v. NLRB,* 612 F.2d 144 (3d Cir. 1979). In *Rapid Manufacturing* the Board imposed a bargaining order on a company which had committed two unfair labor practices during an election campaign. This court denied enforcement, stating:

> As we have previously observed, by no means can we regard two unfair labor practices, such as these, committed during the course of a two month election campaign, as being "pervasive." Nor does the evidence reveal that this was an "extraordinary" case by any standard.

612 F.2d at 149. Similarly, in this case, the Board relied on several unfair labor practices which, by no stretch of the imagination can be labeled "pervasive."

In the instant case, the Board again has mechanistically imposed a bargaining order, the effect of which is to mandate upon non-consenting employees[5] a labor or-

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5. The number of employees in the bargaining unit in the first election was 249. Hedstrom Co. v. NLRB, 558 F.2d at 1141 n.6. At the time of the hearing in these proceedings, there were 312 employees in the bargaining unit, each of whom would be directly affected by the bargaining order.

ganization as the exclusive bargaining agent. Such a draconian remedy should be justified by something more substantial than the traditional deference to the Board's claim of expertise in determining whether campaign tactics are likely to interfere with an employee's freedom of choice. This claimed expertise of the Board, however, is more mythical than real and has caused labor scholars to question the ability of the Board to determine what actually influences the voters' decision. *See*

The majority suggests that the Board need not consider the impact of employee turnover because to do so would "put a premium upon continued litigation by the employer." Maj. op. at 14-15 *quoting* NLRB v. L.B. Foster Company, 418 F.2d 1, (9th Cir. 1969). Whatever justification this rationale may have in cases such as *L.B. Foster,* where the delay is solely the result of proceedings before the Board, is lacking in cases such as this where a major cause of delay was an error by the Board which necessitated a remand by the court of appeals. Requiring the Board to consider subsequent events in cases such as this not only promotes fairness to the employees but places a "premium" upon correct original decisions by the Board; it therefore does not unjustly reward an employer's protraction of the administrative proceedings. In fact, Chromalloy Mining and Minerals, Etc. v. NLRB, No. 78-3410 (5th Cir. July 10, 1980), which is heavily relied upon by the majority, *see* Maj. op. at 14-15, 15 n.8, recognizes that the Board should consider subsequent events, such as employee turnover, after a case has been remanded to it by the court of appeals. *Chromalloy,* slip op. at 7206 *citing* NLRB v. American Cable Systems, 427 F.2d 446 (5th Cir.) *cert. denied,* 400 U.S. 957 (1970); *see "After All, Tomorrow is Another Day": Should Subsequent Events Affect the Validity of Bargaining Orders?,* 31 *Stan.L. Rev.,* 505 (1979). Thus, since a major cause of the delay in this case was the Board's own failure to meet our *Armcor* standards, *see Hedstrom I, supra,* we should not condone the Board's failure to examine the impact of events which transpired during the course of that delay.

Getman and Goldberg, *The Myth of Labor Board Expertise,* 39 U.Chi.L.Rev. 681 (1972); Samoff, *NLRB Elections: Uncertainty and Certainty,* 117 U.Pa.L.Rev. 228 (1968).

> The Board itself has based its findings concerning the impact of various campaign tactics largely on its own speculation and has never conducted an empirical study to determine the impact of various campaign techniques on voting behavior. Recently, however, some empirical research has been conducted. The preliminary results of this research indicate that campaigns have little impact on voting behavior and that the impact they may have is often just the opposite of that which the Board has assumed they would have.

Harlan #4 Coal Co. v. NLRB, 490 F.2d 117, 123 n.5, *cert. denied* 416 U.S. 986 (1974).

I therefore conclude that the Board's bargaining order lacks the support of substantial evidence and is a misapplication of *Gissel.* I would not enforce it. I would also deny enforcement of the Board's order as to all other unfair labor practice violations except for an order reinstating Ritchey with back pay. As to her, I would affirm the Board's order.

Judge Weis and Judge Garth join in this dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Appendix B

Hedstrom Company, a subsidiary of Brown Group, Inc. and District No. 98, International Association of Machinists and Aerospace Workers, AFL-CIO. Cases 6-CA-9532, 6-CA-9575, and 6-CA-9810

April 28, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND MURPHY

On July 26, 1977, Administrative Law Judge Peter E. Donnelly issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and con-

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1. Respondent and the General Counsel have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

clusions[2] of the Administrative Law Judge, to modify the remedy so that interest is to be computed in the manner prescribed in *Florida Steel Corporation,* 231 NLRB 651 (1977),[3] and to adopt his recommended Order, as modified herein.

1. The Administrative Law Judge found, and we agree, that employee Lewis was responsible for making physical contact with vehicles driven by Respondent's president, Ketcham, and Foremen Beland and LeGros when they drove through the picket line which was conducted by Lewis and two other employees. We also agree with his finding that the above-mentioned conduct was accompanied by threats to Ketcham and to Supervisor Jarvela, who was observing the picketing from inside the plant gate. However, we disagree with the Administrative Law Judge's conclusion that Lewis' misconduct was not so serious as to disqualify him from further employment with Respondent.

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2. The Administrative Law Judge indicated, at fn. 11 of his Decision, that his conclusion that the strike was an unfair labor practice strike, and that the strikers were unfair labor practice strikers, was based upon his finding that the strike was caused by the Respondent's refusal to comply with the Board's bargaining order contained in the Board's Decision at 223 NLRB 1409. That Decision was remanded to the Board by the U.S. Court of Appeals for the Third Circuit for the purposes of setting forth the grounds on which the Order was based, and determining whether it is still appropriate. In a Supplemental Decision and Order issued this day, the Board on remand, has reaffirmed its decision that a bargaining order is warranted. 235 NLRB 1193. In accordance with that decision, we adopt the Administrative Law Judge's conclusion that the strike in the instant case is an unfair labor practice strike, and the strikers are unfair labor practice strikers.

3. See, generally, *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).

Appendix B.

Sections 7 and 13 of the Act grant employees, *inter alia,* the right to strike and picket; however, not all forms of conduct literally within the terms of these sections are entitled to statutory protection. In deference to the rights of employers and the public, the Board and the courts have acknowledged that serious acts of misconduct which occur in the course of a strike may disqualify a striker from the protection of the Act. In the case of unfair labor practice strikers, the misconduct of the striker must be balanced against the severity of the employer's unfair labor practices which provoked the dispute.[4] We find that the seriousness of Lewis' misconduct, when considered in light of Respondent's unfair labor practices, warrants his discharge.

On the morning of August 24, 1976,[5] Ketcham drove his car toward the picket line formed by employees Will, Hillegas, and Lewis. When Ketcham's car passed between Hillegas and Lewis, Lewis hit the car with his body, causing the mirror which had been mounted on a swivel to be flattened against the righthand side of the car. Ketcham stopped upon hearing the impact. Lewis then screamed at Ketcham, "Get out of that car, you big prick, or I'll kick the shit out of you, you big prick, come on, come on." Ketcham resumed driving and passed through the picket line into Respondent's parking lot. Thus, Lewis not only threatened Ketcham the company president, with physical harm if he did not leave his car, but also attempted to physically prevent the car from passing by striking it and causing damage.

At the time of the encounter between Ketcham and Lewis, several of Respondent's officials were stationed

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4. *Coronet Casuals, Inc.,* 207 NLRB 304 (1973).
5. All dates are in 1976 unless otherwise indicated.

in the driveway behind the pickets for the purpose of directing traffic. Among these was Jarvela, who saw the incident. Jarvela told Lewis that Lewis had caused the incident by stepping into Ketcham's car. Lewis replied, "I'm going to get you, Red. I'm going to kill you." When Jarvela asked if Lewis were threatening him, Lewis took several steps toward Jarvela and said, "I will get you, Red. I'll kill you." Lewis' initial threat to Jarvela was therefore repeated in the context of physical movement toward Jarvela. In these circumstances, Lewis' conduct undoubtedly constituted a serious threat of bodily harm to Jarvela.

Shortly after the exchange between Jarvela and Lewis, Foreman Beland approached the picket line in a pickup truck. Lewis kicked the right rear fender of the truck as it moved slowly past him. A few minutes later, Lewis struck Foreman LeGros' station wagon as it passed through the picket line. Thus, Lewis' picketing involved physical attempts to impede the passage of vehicles through the picket line.

Taken as a whole, Lewis' conduct consisted of serious threats of bodily harm to two people, and physical actions against three cars resulting in damage to one of the cars. Respondent's unfair labor practices are not of such severity as to outweigh the seriousness of Lewis' misconduct. At the time of Lewis' actions, Respondent's only unlawful act had been to refuse to recognize the Union pending the outcome of enforcement proceedings in the Third Circuit Court of Appeals.[6] While it is true that Lewis would not have been on the

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6. All of Respondent's other alleged unlawful acts involved herein occurred after August 24, 1976, the date of Lewis' misconduct.

picket line had Respondent lawfully complied with the Board's bargaining order, we find that this fact alone is insufficient to counteract the seriousness of Lewis' misconduct. To the contrary, we find that Lewis' misconduct was sufficiently serious to support his discharge by Respondent.

The General Counsel, however, contends that the real reason for the discharge of Lewis was Respondent's union animus and not Lewis' picket line misconduct. He asserts that Respondent condoned picket line misconduct by Connor, a nonstriking employee, while it did not tolerate such misconduct by Lewis, a striking employee. We find no merit in this contention.

In support of his position, the General Counsel points to the following facts with respect to Respondent's treatment of Connor. Director of Employee Relations Sherer was informed that Connor, whom he knew to be a nonstriking employee, had been involved in an incident on the picket line. He gave Connor the opportunity to explain his version of the incident. Sherer testified that Connor told him he had driven to the picket line and exchanged words with the picketers. Sherer told Connor he should not have done that and not to go to the picket line again. No further action was taken with regard to Connor. Sherer, however, admitted that he subsequently read a newspaper article mentioning Connor in connection with assault charges. The article was entitled "Strike-Related Assault Case Settled Out of Court." It stated that four striking employees had filed assault complaints against Connor, charging that he had struck them while they were on the picket line. The article further stated that a settlement was reached wherein the charges were dismissed

and Connor paid prosecution and sheriff's costs, apologized to the four men, and gave assurance that he would av id contact with the persons on the picket line. The article also reported that the magistrate urged both union and nonunion employees to refrain from engaging in harassment. After Sherer read the article, he did not conduct any further investigation of the incident.

The General Counsel contends that Respondent's treatment of Lewis and Connor is disparate inasmuch as Connor was given a chance to explain his conduct and was not further investigated even though Sherer's reading of the newspaper article provided grounds for him to believe that Connor had not given an accurate account of his involvement in the incident. Lewis, on the other hand, was not given an opportunity to explain his conduct and was terminated on the same day it occurred. The General Counsel argues that the reason for the difference in Respondent's treatment of Connor and Lewis was its union animus. We find no merit in this argument.

Respondent's officials were not present at the incident involving Connor. When the incident was brought to their attention, Connor was questioned by Sherer, admitted that he had exchanged words with the pickets, and was orally reprimanded by Sherer. With respect to the decision to discharge Lewis, four of the six Respondent officials[7] who made the decision were directly involved in Lewis' conduct on the picket line. It was therefore reasonable for them to find that an explana-

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7. Ketcham, Beland, LeGros, and Jarvela, who were involved in the Lewis incidents, joined General Superintendent Griffiths and Sherer in making the decision to discharge Lewis.

tion by Lewis or further investigation of the incident was unnecessary.

In contrast, Respondent's officials had no direct knowledge of the incident involving Connor. In order to determine whether Connor was at fault, it was therefore necessary for them to question him. Thus, the difference in treatment of Lewis and Connor is explained by Respondent's direct knowledge of the conduct of the former and its indirect knowledge of the conduct of the latter.

Further, we do not find that Sherer's failure to conduct an investigation of Connor after reading the newspaper article concerning the picket line incident constituted condonation of misconduct by nonstriking employees. The article stated that the case had been settled out of court, and that Connor was required to apologize to the strikers. Thus, the article left unanswered the question as to what role Connor actually played in the incident. Further, there is no evidence that the four striking employees, or anyone else, made complaints to Respondent regarding Connor's conduct after Sherer's interview with Connor. In these circumstances, we find it reasonable that Sherer took no further action against Connor after reading the newspaper article.[8]

Accordingly, we find that Respondent did not unlawfully discharge Lewis and shall dismiss this allegation of the complaint.

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8. In addition, we note that Sherer took no investigatory action toward the four striking employees involved in the court case, even though the article stated that both striking and nonstriking employees were urged not to engage in harassment.

2. The Administrative Law Judge found, and we agree, that employee Rena Ritchey was an unfair labor practice striker who did not receive an appropriate offer of reinstatement, did not waive her right to reinstatement, and was therefore unlawfully terminated by Respondent. The General Counsel agrees with this conclusion, but contends that the Administrative Law Judge should have also found that, even if Ritchey were an economic striker, she was unlawfully denied reinstatement. We find merit in this contention.

The Administrative Law Judge properly found that Ritchey had advised Respondent that she intended to return to work after the strike and that Respondent did not provide her with a valid unconditional offer of reinstatement which included a reasonable time within which to report.[9] We agree for the reasons set forth by him. Further, the parties stipulated that as of September 20, several days after Ritchey's discharge, she had not been permanently replaced. As a matter of law, economic strikers must be reinstated upon their application following the strike if they have not been permanently replaced as of the time of the application.[10] Thus, Ritchey, who had not been permanently replaced, was entitled to reinstatement even if she had been an economic striker. Her reinstatement was unlawfully denied due to Respondent's failure to provide an offer of reinstatement with an adequate time within which to re-

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9. Respondent initially gave Ritchey a few hours' notice and then extended the notice by 2 days. As a result of being out of town, a fact of which Respondent was aware, Ritchey did not receive either notice until it was too late.

10. *Fleetwood Trailer Company, Inc. v. N.L.R.B.*, 389 U.S. 375, 380-381 (1967).

spond. Accordingly, we find that Ritchey was discharged in violation of Section 8(a)(3) and (1) of the Act irrespective of her status as an unfair labor practice striker.

3. The Administrative Law Judge found that on September 14, the first day that striking employees returned to work, Company President Ketcham made the following remarks to former striker Erma England, for the stated reason that the situation in the plant was volatile and England had "a very foul mouth" during the strike:

> Look, I just wanted to make sure that you understand the seriousness of the situation .... Look. Would you please listen to me? Because you are in a area that there are a few people who have been on strike, and you've harassed an awful lot of these people; and their feelings are running awfully high, and I want you to stay in your work area. Do you understand.

Ketcham conceded that he reiterated the work rules to England with particular emphasis on her staying at her workplace. The Administrative Law Judge concluded that Ketcham's remarks were designed to reduce friction in the plant and were not threats to impose more onerous working conditions on her.[11] We disagree.

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11. No specific exceptions were filed with respect to this finding. However, both the General Counsel and Respondent make reference to the England incident in connection with their exceptions to other aspects of the Administrative Law Judge's Decision. The issue therefore has been placed before us. In the absence of exceptions thereto, Member Penello adopts the Administrative Law Judge's dismissal of this allegation.

Ketcham admitted that he viewed England as an active striker who had a foul mouth during the strike. He also accused her of having harassed a number of employees. In these circumstances, Ketcham's action of singling England out for the purpose of reiterating the work rules to her and commanding her to stay in her work area cannot be construed as merely an attempt to insure peace in the plant. Rather, it conveyed the message that Respondent viewed England as a trouble-maker and would enforce the work rules more stringently against her than against other employees.

We therefore find, contrary to the Administrative Law Judge, that Respondent violated Section 8(a)(1) of the Act by threatening employee England with the imposition of more onerous work conditions.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Hedstrom Company, a subsidiary of Brown Group, Inc., Bedford, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(f):

"(f) Refusing to bargain with District No. 98 as the exclusive bargaining representative of our employees in the appropriate unit with respect to rates of pay, wages, hours of employment, or other terms and conditions of employment, and unilaterally and without prior notice to District No. 98 promulgating work rules."

2. Insert the following as paragraph 1(g) and reletter the subsequent paragraph accordingly:

"(g) Threatening employees with the imposition of more onerous work conditions for having engaged in activity on behalf of the Union."

3. Substitute the following for paragraph 2(a):

"(a) Offer Rena Ritchey immediate and full reinstatement to her former job or, if it no longer exists, to a substantially equivalent job, and make her whole for any loss of pay which she may have suffered as a result of the discrimination practiced against her in the manner set forth in the section of this Decision entitled 'The Remedy.' "

4. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the complaint herein be dismissed insofar as it alleges violations of the Act other than those specifically found herein.

Appendix B.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge our employees, thereby discriminating in regard to their hire and tenure of employment in order to discourage membership in International Association of Machinists and Aerospace Workers, District No. 98, AFL-CIO, or any other labor organization.

WE WILL NOT threaten employees with discharge for having engaged in activity on behalf of District No. 98.

WE WILL NOT tell employees that we will never sign a contract with District No. 98.

WE WILL NOT solicit grievances from employees to dissuade them from engaging in activities on behalf of District No. 98.

WE WILL NOT interrogate employees concerning their activities on behalf of the Union.

WE WILL NOT refuse to bargain with District No. 98 as the exclusive bargaining representative of our employees in the appropriate unit described below with respect to rates of pay, wages, hours of employment, or other terms and conditions of employment and WE WILL NOT unilaterally and without prior notice to District No. 98 promulgate work rules.

WE WILL NOT threaten employees with the imposition of more onerous work conditions for having engaged in activity on behalf of District No. 98.

Appendix B.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act, as amended.

WE WILL make Rena Ritchey whole for any loss of pay she may have suffered as a result of our discrimination practiced against her, plus interest, and WE WILL offer her full and immediate reinstatement to her former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority or other rights and privileges.

WE WILL rescind the plant work rules unilaterally promulgated on and after September 13, 1976.

WE WILL bargain, upon request, with District No. 98 as the exclusive bargaining representative of all employees in the bargaining unit described below with respect to wages, rates of pay, hours of employment, or other terms and conditions of employment, including plant work rules, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees, including group leaders at the Bedford, Pennsylvania, plant of Hedstrom Company; excluding office clerical employees, and guards, professional employees and supervisors as defined in the Act.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of the above-named or any other labor organization.

HEDSTROM COMPANY, A SUBSIDIARY OF BROWN GROUP, INC.

Appendix B.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge: The original charge herein (Case 6—CA—9532) was filed on August 30, 1976,[1] by District No. 98, International Association of Machinists and Aerospace Workers, AFL-CIO, herein called the Charging Party or Union. A complaint thereon was issued on November 10, alleging violations of Section 8(a)(3) and (1) of the Act. An answer thereto was timely filed by Hedstrom Company, a subsidiary of Brown Group, Inc., herein called the Employer or Respondent. Another charge (Case 6—CA—9575) was filed by the Charging Party on September 15. An amended charge thereto was filed by the Charging Party on October 8. A second amended charge thereto was filed on November 11. The third charge (Case 6—CA—9810) was filed by the Charging Party on December 14. A consolidated complaint and notice of hearing as to the last two charges was issued by the General Counsel of the National Labor Relations Board on December 20 alleging violations of Section 8(a)(1), (3), and (5) of the Act as detailed therein. An answer thereto was timely filed by Respondent on December 30. Pursuant to notice, the hearing was held on the above complaints by the Administrative Law Judge at Bedford, Pennsylvania, on February 14, 15, and 16, 1977. Briefs have been duly filed by General Counsel and Respondent which have been duly considered.

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1. All dates refer to 1976 unless otherwise indicated.

Appendix B.

FINDINGS OF FACT[2]

I. THE EMPLOYER'S BUSINESS

The Employer is a Delaware corporation with its principal offices located in Bedford, Pennsylvania, where it is engaged in the manufacture and nonretail sale of juvenile furniture and toys. During the 12-month period immediately preceding the issuance of the consolidated complaint Respondent received goods and materials valued in excess of $50,000 from points located outside the Commonwealth of Pennsylvania, for use at its Bedford, Pennsylvania, facility. The complaint alleges, the answer admits, and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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2. There is conflicting testimony regarding many allegations of the complaint. In resolving these conflicts, I have taken into consideration the apparent interests of the witnesses. In addition, I have considered the inherent probabilities; the probabilities in light of other events; corroboration or lack of it; and consistencies or inconsistencies within the testimony of each witness, and between the testimony of each and that of other witnesses with similar apparent interests. In evaluating the testimony of each witness, I rely specifically upon his or her demeanor and have made my findings accordingly. And while apart from considerations of demeanor, I have taken into account the above-noted credibility considerations, my failure to detail each of these is not to be deemed a failure on my part to have fully considered it. *Bishop and Malco, Inc.*, 159 NLRB 1159, 1161 (1966).

Appendix B.

III. Alleged Unfair Labor Practices

A. *Facts*[3]

1. *Background and strike*

The Union's organizational effort among the production workers at Respondent's Bedford, Pennsylvania, plant culminated in an election held on March 28, 1974, which the Union lost. Objections to the election and unfair labor practice charges were filed by the Union. A Board Decision and Order, dated May 12, found that Respondent had engaged in misconduct in violation of Section 8(a)(1) and (5) of the Act.[4] The Board's Order provides, *inter alia,* that Respondent bargain with the Union as the exclusive collective-bargaining representative of Respondent's employees. Thereafter, an exchange of letters, which are in evidence, between the Union and Respondent took place wherein the Union requested Respondent to bargain and Respondent refused. Respondent concedes that it has refused to comply with the Board's Order pending the outcome of enforcement proceedings in the United States Third Circuit Court of Appeals.[5]

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3. The original complaint was amended at the hearing to reflect the following corrections in paragraph 5 as to spelling and job title: James Beland; Terry Voithofer, Assistant Marketing Manager. Further, par. 11(a) of the consolidated complaint was amended to read, "All employees without exception . . . ."

4. *Hedstrom Company, a subsidiary of Brown Group, Inc.,* 223 NLRB 1409 (1976).

5. Such pendency does not, however, preclude disposition of the issues raised in the instant complaint by the Administrative Law Judge. The court decided the case on July 5, 1977 (558 F.2d 1137), and the impact of that decision on the instant case is treated below.

The intransigence of Respondent caused the Union to call a strike. Picketing began on July 12. On August 23 and 24, about 125 of the approximately 300 production and maintenance employees returned to work and Respondent resumed production. The strike ended on September 9 when it was called off by Jesse G. Young, Grand Lodge representative of the Union. Young also, at that time, made an offer on behalf of the employees to return to work and the employees began to return to work on the following Monday, September 13.

2. *Discharge of Thomas Lewis*

On the day that the strike began, July 12, a consent decree was entered into in the Court of Common Pleas of Bedford County, Pennsylvania, which *inter alia,* enjoined the Union from:

> Picketing other than lawfully and peacefully, and from interfering in any manner with ingress to or egress from Plaintiff's Bedford location. In no event should there be more than three pickets, ten feet apart, at any entrance or exit to the said location, except the RR siding which shall not have more than one picket.

Lewis was a picket line captain, normally on the noon-to-6 p.m. shift. According to his testimony, he was advised by State Trooper Stevens about 4 p.m., on the afternoon of August 23, that the three pickets were to be stationary at 10-foot intervals to be "legally picketing." Thereupon, Lewis measured and marked the center of the driveway at the main gate where the picket line had been established. He then measured and marked 10 feet to each side of the center mark for the location

of the other two pickets. Lewis instructed the pickets to remain stationary at those locations and not to patrol.

The following morning, shortly before 6:30 a.m., Young arrived at the main gate where he was advised that the pickets had been told by the state police that the three pickets were to be stationary at 10-foot intervals. The pickets at this time were Eugene T. Will, James Hillegas, and Lewis. These three pickets were stationed by Young with Hillegas in the center; Lewis and Will were about 11 feet from him on either side. All were about 4 feet into the driveway off the public road. Entering the driveway from the public road, Lewis was on the right, Will on the left, and Hillegas in the middle.

About 7:30 a.m., E. L. Ketcham, president of Respondent, made a right turn into the driveway from the public road. He came into the space between Lewis and Hillegas. As he passed Lewis, at a slow rate of speed, he heard a thump on the right hand side of the car and put on his brakes. Lewis then came to the rear of the car and screamed at Ketcham to "get out of that car you, you big prick, or I'll kick the shit out of you, you big prick, come on, come on." Ketcham then resumed the movement with the car into the Employer's parking lot and upon examining the car saw that the mirror, which had been mounted on a swivel, had been flattened up against the side of the car.

At the time that Ketcham came through the driveway, there were several company officials present located several feet behind the pickets in the driveway. They were there to assist in facilitating the flow of traffic and otherwise to protect the interests of the Employer. Among these were Terry Voithofer, assistant marketing

manager, and Armas Jarvela, presently retired, who at that time was superintendent of the toy division.

After the incident which Jarvela had witnessed, he told Lewis that he (Lewis) had created the incident by stepping into Ketcham's car causing contact with the vehicle. Thereupon Lewis turned to Jarvela and said, "I'm going to get you, Red. I'm going to kill you." Jarvela asked if he was being threatened and Lewis, taking two or three steps in Jarvela's direction, reiterated, "I will get you, Red. I will kill you."

Voithofer testified that Lewis moved or leaned into Ketcham's car and he heard a loud bang on the side of the vehicle. Voithofer substantially corroborated the testimony of Ketcham and Jarvela with respect to the statements made by Lewis.

A short time after Ketcham came through the picket line a pickup truck driven by James Beland, machine shop foreman, turned into the driveway. Fred Gardner, quality control manager, was a passenger in the front seat. Beland approached the driveway at a slow rate of speed from the same direction as Ketcham. Lewis was on the right of his truck. As Beland drove slowly past Lewis, Lewis made bodily contact with the side of the truck at the left front and rear. Glenda Mallow, timekeeper, testified that she was in the car immediately following Beland's truck and saw Lewis kick the truck as it passed through. Gardner also testified that he had an unobstructed view of Lewis as he kicked the right rear fender of the truck. The testimony of Gardner and Mallow that Lewis kicked Beland's fender is corroborated by testimony of Terry Ackland, plant controller, who observed the incident from inside the office building about 150 feet away.

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Shortly after the Beland incident, Robert LeGros, foreman in the heat seal department came into the driveway in a station wagon. LeGros testified that as he came into the driveway, Lewis was in front of his station wagon. He slowed down and stopped until Lewis passed to the right front of the station wagon. LeGros heard something strike the station wagon. After this he started again and drove to the plant parking lot.

Lewis testified that the vehicles of Ketcham, Beland, and LeGros were driven so as to make contact with him as he remained positioned at his location on the picket line. The substance of his testimony was that he did not cause the contact himself. Several of the pickets, as well as Young, testified in basically the same fashion as Lewis. However, based upon the credibility criteria set forth above and because Respondent's witnesses had a better view of these incidents, I credit the testimony of Respondent's witnesses to the effect that Lewis did cause the contact with the vehicles as they came into the driveway. It strains credulity beyond reasonable limits to conclude that Lewis could not have avoided contact with these vehicles.[6]

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6. Any justification for remaining stationary because of orders from the state police is also misplaced. Even assuming that the state police did ask the pickets to be stationary, it would have been unreasonable for Lewis to interpret such a request as an order to remain immobile so as to permit himself to be struck by autos. In any event it cannot be argued that any such order to remain stationary was in effect at the time of the incidents described above since Young concedes that shortly after he arrived on the picket line about 6:30 a.m. on August 24, and before the first car came through the picket line, State Trooper Stevens told him that the first picket who did not move out of the way of a car would be arrested.

Sometime later on the same morning between 8 and 9 a.m., Ketcham had a meeting with management officials including Beland, LeGros, Jarvela, William E. Griffiths, general superintendent, and John Sherer, director of employee relations. After a discussion of the above-noted incidents, Ketcham decided to discharge Lewis.

3. *Discharge of Rena Ritchey*

Rena Ritchey, a 10-year employee, was a striker and a union member who picketed regularly at Respondent's premises.

On Friday, September 10, after the strike was called off, Ritchey received a telephone call from Olavi Oja, an analyst in the engineering department. Oja was making calls on behalf of Respondent from a typewritten, alphabetical list in order to determine whether or not the striking employees desired to return to work. Ritchey told Oja that she intended to return. He then read to her the following prepared statement:

> The Company will be in touch with you by phone at this number to let you know when you are to report to work, as soon as we have established our production plan and schedule and have our materials ready. Please do not come to work until we call you back on your reporting time. In the meantime, please listen to your radio and read the Bedford Gazette for public announcements by the HEDSTROM COMPANY. Thank you.

During this same conversation Ritchey also told Oja that she might be going away for a day or 2 and gave him the telephone number of a friend through whom she could be contacted. Oja made a notation on the type-

written list to the effect that Ritchey planned to return to work and listed the telephone number given to him by Ritchey along with the notation "if not home call 839-2474 this weekend." Ritchey denies referring only to the "weekend," stating only that she might be going away inasmuch as she did not know what the production situation was at Hedstrom. In this regard I credit Ritchey despite Oja's notation. It is more reasonable to conclude that she would stay until the hiring situation was clarified with the Respondent. In fact, she did not leave until *after* the weekend when the hiring situation was clarified, at least substantially, on Monday, September 13, as set out below.

Oja testified that he brought the list to Sherer on Saturday, September 11, and explained the notations to him.

On Monday, September 13, about 7 a.m., some 50 employees including Ritchey, gathered at the Employer's parking lot. Griffiths and Sherer spoke to them concerning their return to work. Griffiths read off a list of employees to return that day and told the rest, including Ritchey, that they would be contacted as needed.

After this meeting, Ritchey went home and left Bedford about noon to visit relatives in New Jersey. She called her friend Nancy Gates to advise her of these plans. Gates was already in possession of the telephone number of Ritchey's brother where she would be visiting.

On the same morning of September 13, Jack Faust, personnel manager, called Ritchey at her home. Her son Wayne took the call in her absence. Wayne advised Faust that his mother was not at home.

On Tuesday morning, September 14, Faust again

called Ritchey's home, this time speaking to another son, William, who told him that she was out of town. While Faust and the sons disagree as to whether any messages were left for her to return to work, I do not deem a finding thereon necessary to the disposition of the issue where it is undisputed that Ritchey herself was unaware that anyone from Hedstrom had called her until she returned from the trip on Thursday, September 16.

On Tuesday, September 14, Sherer wrote a certified letter to Ritchey stating:

> On Monday, September 13, 1976, we made a telephone call to your residence and left a message that you should return to work on Tuesday, September 14, 1976, at 7:00 A.M. and to report to the Shipping Department for a meeting prior to the start of work.
>
> You did not report for work on Tuesday, September 14, 1976, and failed to notify us.
>
> Please be advised that if you do not report for work by Thursday, September 16, 1976, your employment with HEDSTROM COMPANY will be terminated.

On Friday, September 17, also by certified mail, Sherer wrote to Ritchey as follows:

> By letter dated September 14, 1976, we advised you that if you failed to report for work by Thursday, September 16, 1976, your employment with HEDSTROM would be terminated.
>
> Since you did not report for work as requested your termination has been made effective this date.

Ritchey returned to Bedford about 5 p.m., on September 16. That evening she was told by her son that

Hedstrom had been trying to contact her.

On Friday, September 17, Ritchey called the Employer and spoke to Faust and Sherer who read her the September 14 letter which she had not yet received. On this day she also spoke to Griffiths who agreed to reconsider her discharge, however, to date she remains discharged pursuant to the final letter. Ritchey received both letters on Saturday, September 18.

Ritchey's job was not filled at the time she called Respondent on September 17. The parties stipulated that there was no permanent replacement hired or assigned to her job prior to September 20.

4. *Erma England: Imposition of more onerous conditions and reducing wages*

a. *More onerous conditions*

Prior to the strike, Erma England had worked for 10 years as an airpress operator in the fiber department. Her supervisor, before and after the strike, was and is Thomas Ickes, who supervised the wood shop and fiber departments.

As noted above, the strike ended on September 9 and the recall of employees began September 13. England was recalled on September 14. However, she was returned to a sanding machine instead of her normal airpress machine. She did not refuse or complain about the assignment. On September 15 she was returned to the airpress operation on a permanent basis.

Ickes testified that the airpress machines were not operating on September 14 because there was still an imbalance in production which resulted in overproduction

on the airpressers while they were running behind in the sanding operation and this was why England was assigned to the sander.

England testified that she is allergic to dust, sulfur drugs, and some foods. In 1974, she complained about dusty conditions because of the sanding machine which is located some 30 feet from her work area, and the situation was corrected by attaching a dust catcher to the sander. England concedes that the dust catcher "is effective." Nonetheless, England testified that this single day of work on the sander caused her to have nosebleeds, which occurred thereafter. However, no medical documentation was offered to support this conclusion and England concedes that there has been no dust problem at her airpress machine since she returned after the strike.

b. *Wage reduction*

The airpress operated by England has two settings. About two or three times a week, it is necessary to readjust the settings to accommodate a different size of stock. Ickes testified that the adjustment takes about 15 minutes; England, that it took about a half hour. It is undisputed that before the strike Ickes made the adjustments for her and that he did not make them for any other airpress operators. It is also undisputed that after the strike ended he did not continue to make these adjustments for her.[7] According to Ickes, he had received complaints about the preferential treatment accorded to England and so he discontinued it and required her to

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7. Making adjustments to the machines appears to be contemplated by the machine operator's job description.

make her own adjustments. Ickes also testified that the loss of an experienced worker left him with less time. Respondent's records indicate that England's average hourly wage was 5.238 per hour during the 4-week period before the strike and 5.380 during the 4-week period after the strike.

5. *Allegations of coercion as to Clark Ferguson*

Delores Casteel, a 10-year employee of Respondent who had participated in the strike, was a member of the union bargaining committee. On the night of September 10, Casteel was in the Carriage House Bar in Bedford. Ferguson, a foreman in the chroming department, came into the bar at 1:20 a.m. with a friend, Joyce Bowser. Ferguson had been drinking and admits to having consumed at least six drinks before arriving. According to Casteel he called her a scab and concerning the prospective return of striking employees on Monday, September 13, said to her, "If I'd be you, I'd be ashamed to; and, furthermore, you have no job." Casteel further testified that Ferguson said, "What did you gain out there on the line, just . . . . Young didn't do a damn thing for you, and you'll never get a contract."

Ferguson admits having imbibed freely on the night in question and that he was at the Carriage House exchanging words, even vulgarities, with Casteel, but he denies having threatened her employment or saying that the Employer would never sign a contract with the Union. However, based on the above-noted credibility criteria, I credit Casteel's version of the event.

Appendix B.

6. *Rena Ritchey: Interrogation and solicitation of grievances*

On September 4, about 3 p.m., Ritchey was located at the picket line inside the union tent at the Employer's shipping gate. Ritchey was visible through the mesh covering. Griffiths came into the tent and according to Ritchey said, "I hear you're having a Union meeting Tuesday night." Ritchey replied affirmatively, and Griffiths asked, "Do you know what it's about?" and Ritchey replied negatively. Griffiths asked what her problem was in the factory, whether or not it was the foremen, and Ritchey replied, "Well, partially, but not really." Ritchey complained that there was no one to take personal problems to and Griffiths replied, "Well, I think you will like our new personnel. It will be handled differently." Ritchey mentioned the pension plan as being inadequate and Griffiths told her that she probably did not understand it and went into a description of the plan.

Griffiths testified that he went to the tent at Ritchey's invitation and that there was a sign in the tent announcing a union meeting on September 7. According to Griffths, he said, "I see you're having a union meeting on Tuesday evening" and further, with respect to the meeting, "I hope you can resolve these issues so that we can all get back to work." Also, "I'm surprised to see you out here." He concedes that he asked her what her problems had been and that there was a discussion concerning the personnel office, the serviceman in her department, and the Employer's pension and profit-sharing plan. Based upon the credibility factors noted above I credit Ritchey's version of the conversation to the extent that they are not consistent.

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7. *Larry Ickes: Impression of surveillance; suggesting and offering assistance in resigning from the Union*

On September 5, Larry Ickes, a striking employee, called Griffiths at his home. Because of personal financial considerations, Ickes asked Griffiths if he could return to work. According to Ickes, he told Griffiths that he had heard there was a union fine. Griffiths replied that one way to avoid a union fine for returning to work was to resign from the Union and that this was his free choice and would not affect his right to return to work.

On September 7, a union meeting concerning the strike was held and on September 8 Ickes returned to work.

According to Ickes, about 8 or 9 a.m., on September 8, Griffiths came by, and after welcoming him, said, "Well, how did the meeting go?" Ickes did not respond. Thereupon, Griffiths said, "Well, I know you was there . . . because you're supposed to report yesterday and I knowed the meeting was supposed to have been last night." Griffiths also added, "Well, I know a couple of guys at the meeting that didn't want to come back until there was a contract signed." Ickes further testified that Griffiths told him if he would like to resign he could, and that there was a copy of a letter up in the Employer's office; that he could get a copy of it, sign it, and send it registered mail to Jessie Young. Ickes replied that he did not want to sign anything at that time.

Griffiths testified, with respect to the September 5 telephone call, that Ickes initiated the discussion of union fines. When Ickes voiced the probability of a union fine, Griffiths told him that he had been advised by Em-

ployer's counsel that he could resign from the Union, but that this was not a condition of his return to work with the Employer. Ickes was to return to work on September 6 (the Employer was operating even though it was Labor Day), but he did not report until September 8 after the union meeting on September 7.

Upon his return, on September 8, according to Griffiths, he told Ickes that he missed him on Monday and Tuesday and that he guessed the reason for the delay was Ickes desire to wait for the union meeting on September 7, so that he could "avoid the embarassment of being called a scab." Griffiths had been made aware of the union meeting in various ways, including a telephone conversation with Robert Verbal, a union committeeman. Griffiths denied telling Ickes that form letters were available for resignation from the Union.

Based upon the credibility formula set forth above, I credit Griffiths' version of these conversations.

8. *Erma England: Threats of more onerous working conditions*

As noted above, Erma England returned to work on September 14. About 8 or 9 a.m., Ketcham approached her. According to England, he told her that she was a very vulgar person and that he was surprised that she wanted to come back. Ketcham told her that there had been a lot of hard feelings and she agreed. According to England, Ketcham also told her not to leave her machine at any time and that she would be watched very carefully. Ketcham testified that on September 14, with the return of the striking employees, he was making a tour of the plant because he was concerned about the "volatility of the situation inside the plant as a re-

sult of the strike ending." He spoke to England and asked her if she had heard the reiteration of the work rules that morning. She said she had and wanted to know why. Ketcham told her that it was a volatile situation and he wanted to make sure she understood the rules because during the strike she had a very foul mouth and feelings were running high in the plant. When she protested, Ketcham said, "Look. I just wanted to make sure that you understand the seriousness of the situation." She reiterated the fact that she did not curse or swear, and Ketcham said, "Look. Would you please be quiet and listen to me? Because you are in a area that there are a few people who have been on strike, and you've harassed an awful a lot of these people; and their feelings are running awfully high, and I want you to stay in your work area. Do you understand." Ketcham concedes that he reiterated the work rules to her with particular emphasis on staying put and then left. Viewed in the light of the credibility factors noted above, I conclude that Ketcham's version of the conversations is the more credible.

9. *Unilateral promulgation of work rules*

On September 13, the first day that employees began returning to work after the strike, Respondent posted, at various locations on the premises, notices to employees containing various work rules. In addition, these notices were read to groups of employees. These notices contained, *inter alia,* three work rules, noted below, which the General Counsel contends were illegal as unilaterally promulgated.

First, that portion of the rules reading:

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All employees without exception must be at their assigned work stations except for:

(a) Authorized rest periods

(b) lunch period

(c) Personal needs when permission has been requested of and granted by your supervisor.

Second, the posting of rules requiring that all first shift employees no longer take coffee breaks at the same time.

Third, that no employee may be on plant premises 5 minutes after quitting time unless otherwise instructed by his supervisor.

Certain portions of the booklet entitled "Employees Manual" instituted in 1966, contained references to these matters, under the captions, *seriatim;* working hours, rest periods, and plant premises.

B. *Analysis and Discussion*

1. *The strike*

I conclude that the strike in the instant case was an unfair labor practice strike since it was caused by Respondent's refusal to bargain with the Union pursuant to the Board's Order. The strikers therefore are unfair labor strikers, entitled to the legal protection afforded them because of their status as such.[8]

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8. This conclusion is, of course, based upon the Board's bargaining order and depends upon the ultimate disposition of the bargaining order issue pursuant to the court's remand. (See fn. 11, *infra.*)

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2. *Lewis' discharge*

As noted above, I conclude that Lewis was himself responsible for whatever contact his body made with the vehicles in the above-described incidents. This performance was accompanied by threats to both Ketcham and Jarvela. However, this misconduct was not, in my opinion, so serious as to disqualify Lewis from further employment with Respondent.

A review of applicable precedent discloses that while neither the Board nor the courts condone picket line misconduct, there are levels of misconduct which are viewed as tolerable, and which do not justify an employer's refusal to reinstate. This acceptable or tolerable "quantum" increases in situations like the instant case, where the strikers are unfair labor practice strikers. That is to say, the misconduct of the strikers is balanced against the unfair labor practices of the employer in deciding whether or not the misconduct justifies the employer's refusal to reinstate. *Coronet Casuals, Inc.*, 207 NLRB 304 (1973).

In evaluating Lewis' misconduct there are certain mitigating factors. A review of the facts shows that all of the misconduct chargeable to Lewis took place on a single day within a relatively short timespan in the early morning. No other misconduct has been alleged as attributable to Lewis. These incidents occurred on August 24. The record indicates that from the time the strike began on July 12, until August 23, the strike had been effective to the extent that there was no production at the plant. On August 24, the strike was "broken" by the return of some 125 employees. Thus, it was on the morning of the first day that employees crossed the picket line that these incidents occurred.

Further, it is my opinion with respect to the nature of the remarks themselves that they were not intended by Lewis to be taken seriously. They were essentially outbursts born of frustration, unaccompanied by any acts of physical misconduct, either at that time or at any later time.

On the other hand, it is clear from the record that the strike was caused by Respondent's unfair labor practice in refusing to bargain with the Union pursuant to an Order of the National Labor Relations Board. Were it not for this unfair labor practice, the strike would not have taken place since he presumably would have been working as an employee while the Union and Respondent engaged in bona fide collective bargaining.

In these circumstances, I conclude that Lewis' misconduct was not so serious as to disqualify him from reinstatement. *Valley Oil Co.*, 210 NLRB 370 (1974).

3. *Ritchey's discharge*

The credited version of the facts herein disclose that Ritchey advised the Respondent that she intended to work after the strike but might be out of town for a few days, giving the telephone number of a friend through whom she could be reached. Thereafter, on Monday, September 13, she went to the plant and was told that she would be contacted as production resumed and employees were called back. On this day about noon, she began a trip from which she returned on Thursday, September 16. Nothing in the record indicates that Respondent made any attempt to reach her at the number she had left with them.

By certified letter dated and mailed September 14, she was told that if she did not return to work by Sep-

tember 16 she would be terminated and she was discharged by letter dated September 17.

As noted above, the strike was an unfair labor practice strike and therefore all strikers, including Ritchey, are unfair labor practice strikers. She is entitled, as a matter of law, to reinstatement. She is also entitled to a valid unconditional offer of reinstatement which includes a reasonable time within which to report. From the facts of the instant case, I do not deem the notice provided in the September 14 letter adequate, even though she had indicated her intention to return to work and had accepted Respondent's offer of reinstatement on September 10. *Seminole Asphalt Refining, Inc.*, 225 NLRB 1202 (1976).

In this regard, I note that Respondent was not resuming full production immediately and probably would not for at least several days. Further, that Ritchey had advised Respondent of her plans to be away and had provided a telephone number through which she could have been contacted. No effort was made, so far as the record reveals, to contact her at that number, and Ritchey did in fact contact Respondent the day following her return. The facts do not, as urged by Respondent, constitute a waiver by Ritchey of her right to reinstatement. In my opinion, Respondent's notice to Ritchey was inadequate and her termination illegal.[9]

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9. Respondent's reliance on a company rule providing for termination upon failure to return to work from a layoff within 3 working days after request is misplaced. The rules governing the reinstatement of unfair labor practice strikers are established by Board and court precedent under the Act.

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4. *Erma England: Imposition of more onerous working conditions and reductions in wages*

a. *Imposition of more onerous working conditions*

The General Counsel contends that the assignment of England to the sanding machine operation for a single day, on September 14, the first day she returned to work after the strike was discriminatory.

Respondent, on the other hand argues that she was assigned to the sander for the day because the airpress, her normal machine, was not in operation that day. It is undisputed that the airpress machines did not operate on September 14. It is also undisputed that on September 15 she was returned to her prestrike job permanently. Respondent takes the position that this temporary assignment was necessitated by production imbalances while production returned to normal. In my opinion, the facts lend more support to Respondent than the General Counsel as to motivation. In summary, I am not satisfied on these facts that the sanding job either was more onerous or, assuming that it was, that the 1-day assignment was made for discriminatory considerations.

b. *Reduction in wages*

The General Counsel contends that England's wages were reduced because of her union activity. According to the General Counsel, this was accomplished when Ickes, a supervisor, discontinued making certain adjustments to her machine, thus requiring England to make them herself.

The facts disclose that before the strike, airpress operators all made their own adjustments with the exception of England. After the strike, Ickes discontinued

making the adjustments for her, citing dissatisfaction on the part of the operators for whom the work was not done, and the loss of an experienced worker during the strike which left him with less time for such matters.

In my opinion, Respondent's conduct was not discriminatory. England was asked only to do what had been required of all the airpress operators; a requirement which her job description appears to contemplate.

Moreover, even assuming that the refusal to continue making the adjustments was motivated by anti-union considerations, the fact of discrimination, i.e., a reduction in wages, has not been established. In fact, Respondent introduced figures which were not controverted by the General Counsel, showing that she suffered no financial losses at all, and in fact made more money after the strike than she did before. Accordingly, I conclude that the General Counsel has not shown that England's wages were discriminatorily reduced and I shall recommend that the allegation be dismissed.

5. *Allegations of coercion as to Clark Ferguson*

As noted above, I conclude that Ferguson made the remarks as alleged by the General Counsel. Respondent, however, argues that even assuming that Ferguson made the statements, no finding of coercion can be based thereon, because, *inter alia,* Ferguson was not Casteel's supervisor, and was without disciplinary authority over her. Nonetheless Ferguson's supervisory status is not disputed and his remarks are chargeable to Respondent. In summary, I conclude that the remarks were coercive and that Respondent thereby violated Section 8(a)(1) of the Act.

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6. *Rena Ritchey: Interrogation and solicitation of grievances*

Having concluded that Griffiths did ask Ritchey what the upcoming union meeting was about, I further conclude that such inquiry exceeded permissible bounds and is coercive interrogation within the meaning of Section 8(a)(1) of the Act. Further, Griffiths inquired of her problems in the plant, with specific attention to her own foreman. When Ritchey recited her problem, Griffiths offered assurances that matters would be handled differently. These remarks are coercive as alleged by the General Counsel in violation of Section 8(a)(1) of the Act.

7. *Larry Ickes: Impression of surveillance; suggesting and offering assistance in resigning from the Union*

The General Counsel contends that Griffiths conveyed to Ickes the impression of surveillance as to Ickes' union activity. I do not agree. It was common knowledge that a union meeting was upcoming on September 7. Griffiths had acquired this information from several sources. To opine to Ickes that his failure to report as arranged was in order to wait for the union meeting on September 7 so as to avoid the embarrassment of being called a scab, which is the testimony I have credited, does not constitute coercion.

Neither do I conclude that Griffiths suggested to Ickes that he resign from the Union, and offered to assist him therein. While Griffiths did tell Ickes that he could avoid a union fine by resigning from the Union, this was not a suggestion to do so. Nor was his return

to work conditioned upon any such resignation, and in fact the opposite assurances were made to him.

Finally, having credited Griffiths in this regard, I conclude that he did not offer to assist Ickes in resigning from the Union.

8. *Erma England: Threats of more onerous working conditions*

On the first day of work after the strike ended, on September 13, there were both striking and nonstriking employees in the plant. This created a potentially dangerous situation and Ketcham had legitimate interest in reducing the hazard. It is my opinion that his remarks to England on September 14 were designed to reduce the possibility of friction in the plant and were not threats to impose onerous working conditions on her.

9. *Unilateral promulgation of work rules*

It is undisputed that the work rules were promulgated on September 13 when the strike ended, as alleged in the complaint, without notice to the Union. Respondent takes the position that it merely reiterated certain rules that were already in existence and contained in its employees' manual.

With respect to paragraph 11(a) and (b) of the complaint, a comparison of the rules in the employees' manual with the posted rules promulgated when the strike ended makes it clear that there are obvious and substantial differences. Clearly their promulgation without notice to the Union violates Section 8(a)(5) of the Act, where, as here, the Union has been designated as the lawful collective-bargaining representative of the employees.

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With respect to paragraph 11(c) of the complaint, while it appears that such a rule is contained in the employees' manual, I conclude, nevertheless, that the promulgation of the rule was unlawful since the penalty provisions of the new rules contained language not present in the rules as they appear in the employees' manual, to wit:

> In accepting employment with the HEDSTROM COMPANY, each employee agreed to observe work rules and to work together in a spirit of cooperation. The following work rules are necessary for safe and business-like operation. *Failure to observe the rules may result in disciplinary action, including discharge.* [Emphasis supplied.]

In these circumstances, the new rule is substantially more than a simple reiteration of the existing rule.

Further, even if all the work rules in issue were only a reiteration of previously existing rules, such a reiteration, in my opinion, would be illegal without notice to the Union in the circumstances in this case. The timing of the reading, posting, and promulgation of these rules to employees just as the strikers returned from an unfair labor practice strike caused by the Company's refusal to bargain with the Union convinces me that promulgation of the rules were designed to circumvent and undermine the lawful bargaining agent of the employees in violation of Section 8(a)(5) of the Act. *Southland Paint Co.*, 157 NLRB 795 (1966).

Appendix F.

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent as set forth in section III, above, occurring in connection with Respondent's operation described in section I, above, have a close and intimate relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that Respondent has engaged in and is engaging in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I have found that Respondent discharged Thomas Lewis and Rena Ritchey for reasons which offended the provisions of Section 8(a)(1) and (3) of the Act. I shall therefore recommend that Respondent make them whole for any loss of pay which they may have suffered as a result of the discrimination practiced against them. The backpay provided for herein shall be computed in accordance with the Board's formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon at the rate of 6 percent per annum computed as described in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

On the basis of the foregoing findings of fact and conclusions, and upon the entire record in this case, I hereby make the following:

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CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce w[illegible]in the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices proscribed by Section 8(a)(1) of the Act.

4. By discharging Thomas Lewis and Rena Ritchey, thereby discriminating in regard to their hire and tenure of employment, in order to discourage membership in the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

5. The following employees of Respondent constitute an appropriate unit for the purpose of collective bargaining within the meaning of the Act:

> All production and maintenance employees including group leaders, at the Bedford, Pennsylvania, plant of Hedstrom Company; excluding office clerical employees, and guards, professional employees and supervisors as defined in the Act.

6. On or about May 17, 1976, the Board issued its Decision and Order (223 NLRB 1409) ordering Respondent to, *inter alia:*

> Upon request, recognize and bargain with [the Union] as the exclusive bargaining representative of the employees in the bargaining unit described

above with respect to wages, hours and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

7. Since on or about May 17, 1976, and all times thereafter, the Union has requested and is now requesting Respondent to bargain collectively with it as the exclusive representative of all employees in the unit described above with respect to wages, hours, and other terms and conditions of employment.

8. Respondent has failed and refused, and continues to fail and refuse to bargain collectively with the Union as the exclusive collective-bargaining representative in the unit described above, although requested to do so by the Union.

9. From on or about July 12, 1976, until on or about September 13, 1976, the unit employees described above ceased work concertedly and engaged in a strike.

10. The strike described above was caused and prolonged by Respondent's unfair labor practices in refusing to bargain with the Union as the exclusive collective-bargaining representative of the above-described unit of employees.

11. Since on or about September 13, 1976, the conclusion of the above strike, Respondent failed and refused and continues to fail and refuse to bargain collectively with the Union by unilaterally and without prior notice to the Union promulgating work rules pertaining to the terms and conditions of employment of employees in the above unit in violation of Section 8(a)(1) and (5) of the Act.

Appendix B.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following recommended:[10]

ORDER[11]

Respondent Hedstrom Company, a subsidiary of Brown Group, Inc., Bedford, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with discharge for having engaged in activity on behalf of the Union.

(b) Telling employees that Respondent would never sign a contract with the Union.

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10. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

11. On July 5, 1977, the U.S. Court of Appeals for the Third Circuit issued its decision in the above-noted prior related case involving Respondent and the Union. (558 F.2d 1137.) In its decision, the court states, "For the reasons stated below we enforce in part and deny enforcement in part; we vacate that portion of the Board's order which requires the Company to bargain, and remand this case for proceedings consistent with this opinion." In the body of its decision, the court concluded, *inter alia,* that the Board had failed to explicate its reasons for issuing a bargaining order on a *Gissel* theory. *N.L.R.B.* v. *Gissel Packing Co., Inc.,* 395 U.S. 575 (1969).

(c) Interrogating employees concerning their activities on behalf of the Union.

(d) Soliciting grievances from employees to dissuade them from engaging in activities on behalf of the Union.

(e) Discharging employees, thereby discriminating in regard to their hire and tenure of employment in order to discourage membership in the Union, or any other labor organization.

(f) Unilaterally and without prior notice to the Union, promulgating work rules relating to terms and conditions of employment of employees in the collective-bargaining unit represented by the Union.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which I find is necessary to effectuate the policies of the Act:

(a) Offer Thomas Lewis and Rena Ritchey immediate and full reinstatement to their former jobs or, if

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My conclusion that the strike was an unfair labor practice strike and the strikers unfair labor practice strikers is based upon my finding that the strike was caused by Respondent's refusal to comply with the Board's bargaining order pending Respondent's appeal to the Third Circuit. The validity of the bargaining order is again unresolved because of remand.

Obviously, since basic allegations in the instant case depend upon the ultimate resolution of the underlying *Gissel* issue, the remedial action recommended herein must await resolution by the Board of that issue upon remand. However, despite the remand, it is my opinion that the interests of administrative efficiency are better served by issuance of the instant decision at this time.

they no longer exist to substantially equivalent jobs, and make them whole for any loss of pay which they may have suffered as a result of the discrimination practiced against them, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Rescind the plant work rules unilaterally promulgated on and after September 13, 1976.

(c) Upon request, bargain collectively with District No. 98 International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive representative of the employees in the unit found appropriate herein, with respect to the rates of pay, wages, hours of employment, or other terms and conditions of employment, including plant work rules and, if an understanding is reached, embody such understanding in a signed statement.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(e) Post at its facility at Bedford, Pennsylvania, copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Re-

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12. In the event that this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

spondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint herein be dismissed insofar as it alleges violations of the Act other than as specifically found herein.

Appendix C

Hedstrom Company, a subsidiary of Brown Group, Inc. and International Association of Machinists and Aerospace Workers, District No. 98, AFL-CIO. Cases 6-CA-7619 and 6-RC-6762

April 28, 1978

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND MURPHY

On May 12, 1976, the National Labor Relations Board issued its Decision and Order[1] in this proceeding. The Board, in agreement with the Administrative Law Judge, found that Respondent had violated Section 8(a)(1) of the Act by expressly and impliedly threatening to close its plant in the event the Union won the election; by threatening employees with other reprisals if they selected the Union; by interrogating employees about their union activities, membership, and desires; by promising employees various benefits and granting them benefits if they refrained from selecting the Union; by soliciting grievances; and by creating the impression of surveillance of employees' union activities.

In addition, the Board, unlike the Administrative Law Judge, found that Respondent further violated Section 8(a)(1) of the Act by its president, Ketcham, threatening employee Norman Anderson with discharge.[2] It also found that the Union attained majority

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1. 223 NLRB 1409.

2. Then-Chairman Murphy dissented from this additional finding.

status by February 15, 1974, set aside the election held on March 28, 1974, and concluded that because of Respondent's unfair labor practices a second and fair election had little or no likelihood of being conducted. Accordingly, the Board concluded that the circumstances of the case warranted an order directing Respondent to recognize and bargain with the Union, and found that Respondent violated Section 8(a)(5) of the Act by refusing to do so.[3]

Thereafter, on July 5, 1977, the United States Court of Appeals for the Third Circuit issued a decision[4] in which it granted enforcement of the Board's Order relating to the violations of Section 8(a)(1) found by the Administrative Law Judge, reversed the Board's finding of an 8(a)(1) violation in Respondent president's statements to employee Norman Anderson, and reversed the Board's finding of an 8(a)(5) violation. The court vacated the Board's bargaining order, noting that the Order must be evaluated in light of the Supreme Court's decision in *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969, which indicated that a bargaining order without requiring an election would be appropriate in either of two situations: first, in those "exceptional cases" in which the unlawful conduct is so "outrageous" and "pervasive" that traditional remedies cannot eliminate their coercive effects; and, second, in those "less extraordinary cases" in which there are less pervasive practices, but where there is a showing that the union at some point had a card majority, and where the Board con-

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3. In this regard, the Board concluded that the Administrative Law Judge had erred in not permitting the complaint to be amended to include a violation of that section of the Act.

4. 558 F.2d 1137.

cludes that the extensiveness of the unlawful conduct has a "tendency to undermine majority strength and impede the election processes." 395 U.S. at 613-614. The court further noted that it had pointed out in *N.L.R.B.* v. *Armcor Industries, Inc.,* 535 F.2d 239, 244 (1976), that the Board is required to "clearly explicate its reasons for issuing a bargaining order and include findings as to why a fair election cannot be held." The court found that the Board has not met this requirement in the instant case, and that it has instead made the conclusory findings that the unfair labor practices were numerous and extensive, and that the case therefore fell within the second *Gissel* category, requiring a bargaining order. Accordingly, the court remanded the matter to the Board to make "specific findings" with respect to the impact of the unlawful conduct on the election process, and to give "a detailed analysis" of the lingering effect of said conduct and the likelihood of a fair rerun election. In so doing, the court stated the following additional reasons for requiring a remand: first, the Board must evaluate the effect of the reversal of its findings of a violation of Section 8(a)(5) and of one of Respondent's allegedly more flagrant violations of Section 8(a)(1); second, the Board failed to assess the impact of the Bedford Gazette's front page editorial on the election and the chances for a fair rerun election; and third, the Board has not considered what effect the passage of 3 years would have on the possibility of having a second and fair election.

The Board, having accepted the remand, respectfully recognizes the above-mentioned court opinion as binding upon it for the purpose of deciding this case.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National

Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record as a whole and the decision of the United States Court of Appeals for the Third Circuit remanding the proceedings and, for the reasons set forth below, has decided to reaffirm that part of its initial Order which requires Respondent to bargain with the Union upon request.

The record evidence as found by the Board and the reviewing court establishes that the Union's campaign formally began on February 5, 1974,[5] when an organizational meeting of some 35 company employees was held at a Holiday Inn. The following day, Supervisor Rheault coercively interrogated employee Wambaugh about the February 5 meeting. On February 9, Foreman Will gave employee Hilmer the impression that the February 5 meeting had been under company surveillance.

Thereafter, Respondent conducted a vigorous campaign against the Union which continued unabated until the eve of the election. The campaign was conducted by 11 supervisors, including Plant Manager Griffiths and Respondent's president, Ketcham.

Griffiths engaged in unlawful conduct with 18 employees who worked in various departments in the plant. His conduct consisted of interrogation regarding employees' union sympathies, the solicitation of grievances, and the promise and granting of benefits. Thus, for example, Griffiths asked employee Figard what he thought about the Union. After Figard said he had not made up his mind, Griffiths asked him if he had any problems. Figard answered that he needed a jog button

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5. All dates are in 1974 unless otherwise indicated.

on his press and that he would prefer not to have his rate of pay changed when he was occasionally shifted to another job. Griffiths said he would see about these problems. The next day Figard was placed on straight pay. A jog button was installed on his press 3 days later.

On another occasion, Griffiths stopped by the station where employee Imler was assembling wheels and asked Imler, who was wearing a union button, how he thought the election would turn out. After Imler said he was not sure, Griffiths asked if he had any complaints. Imler said he thought that servicemen were overworked and underpaid. Griffiths said Respondent was working on establishing an incentive plan for servicemen.

About a week before the election, Griffiths approached employee Deremer, a laborer, at his work station and told him that things would be better next year because Respondent was bringing in more machines and creating more jobs in Deremer's department. Griffiths added that the Union would not help employees at that time because Respondent would have to continue to go by seniority.

Griffiths also asked employee Brant, a wheel hanger, what he thought about the Union. When Brant said he had not made up his mind, Griffiths said the building would not be worth much without Respondent, thus implying that the plant would close in the event the Union won the election.

Nine of Respondent's lower level supervisors engaged in conduct similar to Griffiths' by interrogating employees and soliciting grievances. In addition, Supervisors Rheault, Logue, Beland, A. Diehl, and Spriggs

conveyed to a number of employees the threat that the employees would lose their benefits or suffer more onerous working conditions if the Union were selected. The following are representative examples:

Supervisor Rheault had been a union steward at Respondent's plant in Fitchburg, Massachusetts, which had closed due to unionization. He told employee Whetstone that the Union had stifled Respondent's growth in Fitchburg and that, if the Union won the Bedford election, it would cause the Company to lose contracts from its customers.[6]

Rheault asked employee Ickes how he felt about a union. After Ickes said he could not really judge, Rheault said that, if the Union got in, benefits might have to be renegotiated.

Supervisor Logue, the payroll manager, told employee Lewis that she thought he had been given a break by Respondent and that he ought to give Griffiths and Ketcham a chance. She added, "You don't want to be standing out in a picket line half of the winter." She later told employee Hilmer that something had to be done about the men wanting a union in the plant. She said, "If they bring the union in here, it's only going to cause trouble and they will be the ones to suffer in the end. They pay for it, no matter how you look at it."

Respondent's campaign ended with a speech by Company President Ketcham on the eve of the election. In his speech, Ketcham pointed out that this was the third representation election there in 7½ years. After

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6. The court of appeals, apparently inadvertently, substituted the name of Whetstone for that of Rheault in its decision, 558 F.2d at 1144.

discussing Respondent's present fringe benefits, wages, and working conditions, he gave six reasons why Respondent did not want the Union to win the election. In the fifth reason Ketcham said:

> This Company has already had experience with a union—in Fitchburg. It was an unhappy experience for us, and we honestly think it was for our hourly employees also. Unions aren't always what they are cracked up to be.

The Board found that it was common knowledge in the town of Bedford that Respondent had closed its plant in Fitchburg to escape the consequences of unionization.

Ketcham's speech, containing the threat of plant closure, was given to the second shift around 10 p.m. on March 26 and to the first shift on the morning of March 27. On the morning of March 28, the Bedford Gazette printed an editorial on its front page entitled Hedstrom Employees to Vote Today on Unionization." The article contained the following statements:

> Hedstrom, which was sold to Brown Group, Inc., of St. Louis two years ago, has its headquarters in Bedford. Headstrom's largest production facility is in Dothan, Ala. The headquarters shift from Fitchburg, Mass., to Bedford, was made to escape what management felt was an untenable union relationship. "A bitter experience," one said. The Hedstroms left Fitchburg—and the union—behind.
>
> * * * * *
>
> The real issue in the election may be the company's expansion plans. Company officials confirm that the parent corporation, Brown Group, has

> approved a $1 million addition to the massive plant along Sunnyside Road. . . .
>
> * * * * *
>
> Hedstrom President E. Lee (Jack) Ketcham told Bedford Rotary a month ago that "It's Bedford's turn to grow." Ketcham said most of the growth in recent years had been at the Dothan, Ala. plant, which is not unionized.
>
> When—or if—the expansion will be made could hinge on the union situation, but company officials wouldn't say that. One officer said, "We've all been too busy on this election to think about it."

The polls opened at 3 p.m. on the same day the article appeared.

With respect to the seriousness of Respondent's unfair labor practices and the impact one might reasonably expect them to have had on employees, we note at the outset that the possibility of plant closure in the face of unionization was an issue which loomed large in the election campaign. The Board has long held that the threat of job loss through plant closure has a seriously coercive effect on employees' freedom of choice in the election of a collective-bargaining representative. Thus the Board has stated:

> Threats of loss of work and income are a type of threat likely to have the most substantial impact upon employee attitudes and reactions. By their nature they may justifiably be regarded as serious violations of the Act.[7]

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7. *Cohen Bros. Fruit Company,* 166 NLRB 88, 90 (1967). See also *General Stencils, Inc.,* 195 NLRB 1109 (1972).

Further, in *Gissel, supra,* the Supreme Court recognized the serious impact of such threats when it made reference to a study which showed that threats to close or transfer plant operations were more effective in destroying election conditions for a longer period of time than were other types of unfair labor practices.[8]

Respondent's employees were exposed to the threat of plant closure throughout the campaign. The entire Bedford community was aware that Respondent had recently closed the Fitchburg plant due to the presence of a union. As discussed earlier, both high- and low-level supervisors unlawfully raised the Fitchburg example to employees during the campaign, and impliedly threatened Bedford employees with the same fate in the event that they selected the Union. Indeed, Respondent's president, Ketcham, ended the campaign with a speech to all employees which raised the spectre of the "unhappy experience" at Fitchburg.

As to the newspaper article which the court has instructed us to consider, it appeared on the morning of the election and recounted the Fitchburg experience and suggested that the Company's expansion plans might be adversely affected by the presence of a union on the scene. Thus, the fears engendered by the implied threats of company officials and supervisors were articulated in an article published by an independent source. This article would tend to reinforce the employees' belief that Respondent's threats were not merely campaign rhetoric, but serious admonitions regarding the consequences of unionization.[9]

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8. *N.L.R.B.* v. *Gissel Packing Co.,* 395 U.S. at 611, fn. 31.

9. Our conclusion herein, however, would remain the same even in the absence of such an article.

In addition, the Company's intensive antiunion campaign included approximately 40 unfair labor practices, demonstrating the Company's willingness to exceed the limits of the law in its attempt to prevent unionization. It may reasonably be inferred that the total effect of the threats of closure, and the numerous other unfair labor practices against the background of the general awareness of the Fitchburg experience was to instill in employees a strong fear of loss of employment that would continue to be operative even in the event of a second election. This fear could only have been exacerbated by the publication of the newspaper editorial.[10]

We find that "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order . . . ."[11] This conclusion is not significantly affected by the reviewing court's reversal of our finding that President Ketcham violated Section 8(a)(1) by threatening to fire an employee. The reversal does not disturb any of the findings concerning the threats of plant closure, or the overall context in which those threats occurred, which form the basis for our conclusion that a bargaining order is warranted.[12]

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10. See *Universal Manufacturing Corporation of Mississippi,* 156 NLRB 1459 (1966).

11. *N.L.R.B.* v. *Gissel Packing Co.,* 395 U.S. at 614-615.

12. *General Stencils,* 195 NLRB at 1110, where the Board stated, with respect to threats of plant closure:

> Such threats may, of course, be presumed to have had a severe initial impact on the employees.

Appendix C.

The court of appeals, in remanding this matter to us, directed that we should consider what effect the passage of more than 3 years would have on the possibility of a fair second election. Although in our view the validity of a bargaining order in this case and in similar cases should properly rest upon our analysis of the seriousness and pervasiveness of the unlawful conduct at the time that conduct was first presented for our scrutiny,[13] in conformity with the court's instructions we have carefully considered this question. For the reasons stated below, we find that the passage of time has not

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But initial impact is not the focus of our inquiry. Under *Gissel* we must attempt to measure the impact over time and, also, to assess the likelihood that any lasting impact can be mitigated by remedies short of an order to bargain. Mathematical precision of analysis is not to be expected in such a task. Merely requiring the Employer to refrain from repeating such threats will not, of course, erase the threat from the employees' memory. The *impact* of the threat lingers long after the utterances have been abated. Moreover, the standard remedy for less severe violations—the posting of a notice informing employees that the employer will not repeat his unlawful conduct—often prolongs that impact by insuring that each and every employee is reminded that such a threat was made. Aware that the employer has once threatened him with discharge or plant closure, an employee is likely to find little security in a promise that the threat will not be reiterated.

13. To conclude otherwise is "to put a premium upon continued litigation by the employer." *N.L.R.B.* v. *L. B. Foster Company,* 418 F.2d 1, 4-5 (C.A. 9, 1969). See also *Gibson Products Company of Washington Parish, La., Inc.,* 185 NLRB 362 (1970).

increased the likelihood that a fair second election can be held.

As noted above, the effect of Respondent's threats of plant closure and its extensive unfair labor practices during the course of the campaign was to instill in employees the fear that they would lose their jobs through plant closure if the Union won the election. There is nothing to indicate that this fear has been erased during the past 3 years. To the contrary, recent events indicate that Respondent's vigorous opposition to the Union continues to result in unfair labor practices, thereby sustaining, reinforcing, or increasing the fear that the Company might still carry out its earlier threat to close operations if the Union prevails. Thus, in a case issued this day,[14] we find that Respondent violated Section 8(a)(3) and (1) of the Act by terminating employee Ritchey, a union member who participated in and actively supported the Union's strike against Respondent, at a time when she had been neither provided with an adequate offer of reinstatement nor permanently replaced after the strike ended. In addition,

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14. *Hedstrom Company, a subsidiary of Brown Group, Inc.*, 235 NLRB 1198 (1978). Respondent conceded that it refused to comply with the Board's Order in *Hedstrom Company, a subsidiary of Brown Group Inc.*, 223 NLRB 1409 (1976), pending the outcome of enforcement proceedings in the Third Circuit Court of Appeals. The Union called a strike in response to Respondent's refusal to comply with the Board's Order, and the above-cited case concerns Respondent's conduct during and after the strike. Some of Respondent's actions therein were found to be violations of the Act only as a result of its unlawful refusal to bargain with the Union; others were found to be independently violative of the Act. The unfair labor practices relied on herein as supporting the bargaining order are in the latter category.

Respondent was found to have violated Section 8(a)(1) through Plant Manager Griffiths' interrogation and solicitation of grievances of an employee, and through Foreman Ferguson's threat that an employee had no job and that the strike was futile because the Union would never get a contract. Finally, we found that Respondent through President Ketcham violated Section 8(a)(1) by threatening employee England with more onerous work conditions as a result of her participation in the strike.[15] In these circumstances, we find that a bargaining order is still necessary despite the passage of time from the date of Respondent's earlier unlawful conduct.

As a final reason for remanding the case to us, the court of appeals noted that it had reversed our finding that Respondent violated Section 8(a)(5) by refusing to recognize and bargain with the Union. The court's conclusion with respect to the violation was based upon the fact that the Union demanded recognition 3 days before it achieved majority status[16] and made no further demand after achieving such status. In the circumstances of the case, the court found the initial request for recognition did not constitute a "continuing demand," and that a violation of Section 8(a)(5) had therefore not been established. As a result of the court's finding, we are presented with a case where no effective demand for recognition was made and where a bargaining order is nevertheless required to remedy the effects

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15. In the absence of exceptions thereto, Member Penello adopts the Administrative Law Judge's dismissal of this allegation.

16. The request for recognition was made on February 12, 1974. The Union achieved majority status by February 15, 1974.

of Respondent's unfair labor practices. We shall therefore issue an order in accordance with our established practice in such cases.[17] We note that, while Respondent's unfair labor practices began on February 6, the Union did not achieve majority status until February 15. We shall therefore require that Respondent bargain with the Union as of February 15, the date on which the Union attained majority status and on which Respondent's unlawful course of conduct continued.

Based on the foregoing, and the entire record in this case, the National Labor Relations Board hereby affirms its Order issued in this proceeding on May 12, 1976, as modified below.[18]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board reaffirms, except as modified below, its Order issued in this proceeding on May 12, 1976 (reported at 223 NLRB 1409), and hereby orders that the Respondent, Hedstrom Company, a subsidiary of Brown Group, Inc., Bedford, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said Order, as so modified:

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17. See *Beasley Energy, Inc., d/b/a Peaker Run Coal Company, Ohio Division #1,* 228 NLRB 93 (1977).

18. The court of appeals' reversal of the finding of a violation of Sec. 8(a)(5) and (1) requires the modification of our original Order. No further modification is required by the court's reversal of our finding that Respondent violated Sec. 8(a)(1) by President Ketcham's threat to employee Norman Anderson inasmuch as there were other threats of retaliation which were found by the Board and enforced by the court.

Appendix C.

1. Delete paragraph 1(h) under paragraph 1 of our Order and reletter the subsequent paragraph accordingly.

2. Substitute the attached notice for that attached to our Decision of May 12, 1976.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Act gives all employees these rights:

To engage in self-organization

To form, join, or help unions

To bargain collectively through a representative of their own choosing

To act together for collective bargaining or other aid or protection

To refrain from any or all of these things.

WE WILL NOT threaten to close this plant if you select International Association of Machinists and Aerospace Workers, District No. 98, AFL-CIO, hereinafter District No. 98, or any other labor organization, as your collective-bargaining representative. We have no intention of closing this plant at any time for any reason which is prohibited by law.

WE WILL NOT threaten you with any other reprisals if you select District No. 98, or any other labor organization, as your collective-bargaining representative.

Appendix C.

WE WILL NOT promise you benefits if you refrain from selecting District No. 98, or any other labor organization, as your collective-bargaining representative.

WE WILL NOT grant you benefits if you refrain from selecting District No. 98, or any other labor organization, as your collective-bargaining representative.

WE WILL NOT solicit grievances from you in order to deter you from selecting District No. 98, or any other labor organization, as your collective-bargaining representative.

WE WILL NOT interrogate you about your union activities, membership, and desires.

WE WILL NOT create an impression that we have your union activities under surveillance.

WE WILL NOT in any other manner interfere with you or attempt to restrain or coerce you in the exercise of the above rights.

WE WILL, upon request, bargain collectively with District No. 98 with respect to wages, hours, and other terms and conditions of employment of the employees in the following appropriate unit:

> All production and maintenance employees, including group leaders, at the Bedford, Pennsylvania, plant of Hedstrom Company; excluding office clerical employees and guards, professional employees, and supervisors as defined in the Act.

All our employees are free, if they choose, to join District No. 98, or any other labor organization.

HEDSTROM COMPANY, A SUBSIDIARY OF BROWN GROUP, INC.

Appendix D

HEDSTROM COMPANY, a subsidiary of Brown Group, Inc., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

No. 76-1700.

United States Court of Appeals,
Third Circuit.

Argued Jan. 14, 1977.

Decided July 5, 1977.

Nicholas Unkovic, W. D. Armour, Reed, Smith, Shaw & McClay, Pittsburgh, Pa., for petitioner.

Howard E. Perlstein, John S. Irving, Gen. Counsel, John E. Higgins, Jr., Deputy Gen. Counsel, Carl L. Taylor, Associate Gen. Counsel, Elliott Moore, Deputy Associate Gen. Counsel, Aileen A. Armstrong, Jane P. Schlaifer, N. L. R. B., Washington, D. C., for respondent.

Before ROSENN and HUNTER, Circuit Judges, and COOLAHAN, Senior District Judge.*

OPINION OF THE COURT

COOLAHAN, Senior District Judge.

Hedstrom Company, a subsidiary of Brown Group, Inc. (hereinafter Hedstrom or the Company), petitions this Court, pursuant to 29 U.S.C. § 160(f), to review,

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*James A. Coolahan, United States Senior District Judge for the District of New Jersey, sitting by designation.

modify, or set aside the National Labor Relations Board's finding of violations of §§ 8(a)(1) and (5), National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (5) (1970), and for an order vacating the National Labor Relations Board's May 12, 1976, order to bargain.[1] The National Labor Relations Board (hereinafter the Board) cross-petitions for an order of enforcement.

The Board found that Hedstrom violated § 8(a)(1)[2] of the National Labor Relations Act (hereinafter the Act) by coercively interrogating and threatening employees, unlawfully soliciting employee grievances, creating the impression of surveillance, promising and granting benefits to employees, and threatening employees with plant closure in the event they elected the union, in an attempt unlawfully to interfere with employee organizational rights protected by § 7 of the Act.[3] The Board also sustained the union's objections

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1. *Hedstrom Company, a Subsidiary of Brown Group, Inc., Bedford, Pa. and International Association of Machinists and Aerospace Workers, District 98, AFL-CIO,* Case No. 6-CA-7619 and No. 6-RC-6762, 223 NLRB No. 211, 92 LRRM 1297 (1976).

2. Section 8(a) of the Act, 29 U.S.C. § 158 (1970), reads:

> "(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title."

3. Section 7 of the Act, 29 U.S.C. § 157 (1970), reads:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other con-

to the March 28, 1974, election. In addition, the Board found that the Company violated § 8(a)(5) of the Act[4] by refusing to recognize and bargain with a majority status union. The Board found that the Company's unfair labor practices were so pervasive as to preclude the possibility of a fair election to determine whether the employees desired the International Association of Machinists and Aerospace Workers, District 98, AFL—CIO, as their collective bargaining agent. Consequently, the Board issued an *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), bargaining order. For the reasons stated below we enforce in part and deny enforcement in part; we vacate that portion of the Board's order which requires the Company to bargain, and remand this case for proceedings consistent with this opinion.

Hedstrom Company, a Delaware corporation with four plants located throughout the country, engages in the manufacture and non-retail sale of juvenile toys and furniture. The plant in which the alleged unfair labor

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certed activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

4. Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5) (1970) reads:

"It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

practices occurred is located in Bedford, Pennsylvania. This company branch had been located in Fitchburg, Massachusetts, until 1966 when the Company decided to relocate its plant and corporate headquarters in Bedford. While in Fitchburg, company employees were represented by the United Furniture Workers of America, AFL-CIO. That union engaged in a 13-week strike at Hedstrom's Fitchburg plant, which contributed to the Company's decision to relocate. Hedstrom's Bedford plant has been nonunion since it opened in 1966. Several unionizing attempts were unsuccessful due to a lack of employee support as evidenced by insubstantial pro-union election votes.[5] However, the most recent unionizing campaign, which gave rise to the instant proceeding, proved more successful. It was started in late January, 1974, by some company employees who expressed an interest in representation by the International Association of Machinists and Aerospace Workers, District No. 98, AFL—CIO (hereinafter the Union).

On February 5, 1974, union representative Jesse Young conducted an organizational meeting at the Holiday Inn in Bedford, which was attended by 35 company employees. All but one employee present signed

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5. Two previous unionizing efforts resulted in elections, and one did not. The first election (6-RC-4628) was held on April 2, 1968, in which the Furniture Workers International received only one vote and Local 453 of the International Brotherhood of Teamsters, Chauffeurs and Helpers of America received 54. There were 119 ballots marked neither. Objections to the election were overruled. On October 15, 1970, another election (6-RC-5576) was held in which the International Union of District 50, Allied and Technical Workers of the United States and Canada failed to receive a majority. No objections were made to this second election. There is no record of the vote.

union authorization cards at that meeting. A few days later additional union authorization cards were signed and turned over to Young. On February 12 the Union by letter requested that the Company recognize it as the collective bargaining representative for Hedstrom's Bedford production and maintenance employees.[6] Two days later company president E. Lee (Jack) Ketcham, Jr., in response to the Union demand, suggested that the Union file a representation petition with the Board.

On February 21 the Union filed its petition with the Board.[7] Pursuant to a stipulation for certification upon consent election,[8] an election was held on March 28. The vote was 113 for the Union and 125 against it, with three void ballots. On April 2 the Union filed with the Board objections to conduct on the part of company management personnel which allegedly destroyed laboratory conditions necessary for an election.

The Union in its objections to the election charged that (1) company management, along with the Bedford Gazette, a local daily newspaper, and the Industrial De-

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6. This particular bargaining unit consists of 249 employees and is an appropriate unit within the meaning of the Act.

7. The Union incorrectly stated in its petition that the employer had not replied to its February 12 letter. Jesse Young testified that he was not sure whether the Union received the Company's reply before or after the Union petitioned for an election. Appendix, 64a.

8. The stipulation was entered into by the employer and the Union along with the United Steelworkers of America on March 6. The Regional Director notified all parties by letter on March 19 that the United Steelworkers of America withdrew its name from the ballot.

velopment Commission,[9] threatened, intimidated, and coerced Hedstrom employees, thereby interfering with laboratory conditions; (2) company president Ketcham in an election-eve "captive audience" speech conveyed the impression that if the Union won the election, the Company would move from Bedford; (3) the Bedford Gazette conveyed this same threat, and implied that plant expansion hinged on the outcome of the election. Appendix 28a. Only the second objection was alleged as an unfair labor practice in violation of § 8(a)(1). On July 8, 1974, the Regional Director of the Board issued an order directing a hearing on the Union's objections. Subsequently, on July 12, 1974, the Union filed unfair labor practice charges against the Company, alleging that management personnel waged an antiunion campaign by coercively interrogating and threatening employees, unlawfully soliciting grievances, creating the impression of surveillance, and by promising and granting benefits to employees. After hearings on the Union charges and objections, the Administrative Law Judge (A.L.J.) rendered his decision on November 19, 1975, finding certain § 8(a)(1) violations. He sustained three union objections to the election and recommended that the election be set aside and another held. He also issued a cease-and-desist order. He did not find that the Union had a card majority. The A.L.J. concluded that a bargaining order was unnecessary. By a vote of 2 to 1,

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9. The Industrial Development Commission (hereinafter the Commission) of Bedford brought Hedstrom to Bedford in 1966. The Regional Director of the Board did not allege that the Commission had committed a § 8(a)(1) violation. He alleged, however, that the Commission interfered with laboratory conditions. The Administrative Law Judge sustained the Regional Director's objections to the election. The Board affirmed.

Chairman Murphy dissenting, the Board reversed the A.L.J.'s finding of no § 8(a)(1) violation with respect to an alleged threatening conversation between company president Ketcham and an employee named Norman Anderson, but sustained all other § 8(a)(1) findings. The Board found, consistent with the finding of the A.L.J., that president Ketcham's election-eve speech was coercive. The Board also found, contrary to the A.L.J., that the Union had obtained a card majority which was dissipated by employer unfair labor practices and, consequently, issued an order to bargain. Hedstrom petitions for an order denying enforcement of the Board's order and respondent cross-petitions for enforcement.

§ 8(a)(1): UNFAIR LABOR PRACTICE CHARGES

The Union charged the Company with approximately 41 separate § 8(a)(1) unfair labor practices. Most of these charges accuse lower-level management personnel of interfering with employee § 7 rights. However, some of the charges allege that the company president and the plant manager also committed § 8(a)(1) unfair labor practices. The Board[10] found that the Company had engaged in an active and pervasive anti-union campaign immediately following the Union's initial organizational meeting held at the Holiday Inn on February 5.

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10. The Board adopted most of the A.L.J.'s findings of fact. Therefore, a reference to the A.L.J.'s findings should be understood to be consistent with those of the Board and vice versa, unless the contrary is stated.

Petitioner concedes that it committed § 8(a)(1) violations.[11] However, petitioner characterizes these violations as fairly innocuous. Its position is that its conduct did not make a fair election impossible.

Inasmuch as petitioner concedes most of these unfair labor practices, we need not review in detail the evidence and law supporting the Board's findings, except insofar as they are germane to our discussion of the appropriateness of the Board's order to bargain. The A.L.J. found that most of the unfair labor practices taken alone would not have disturbed the laboratory conditions necessary for a fair election; taken together, however, they did destroy laboratory conditions.

The A.L.J. found that after the Union held its first organizational meeting, William Griffiths, the Company's plant manager, began to solicit employee grievances in order to dissuande pro-union votes.[12] The A.L.J.

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11. At oral argument, Judge Rosenn asked petitioner if it seriously disputed the claim of § 8(a)(1) violations. Counsel for Hedstrom answered, "[n]o, I cannot." Petitioner does contend, however, that the "alleged" threat to fire Norman Anderson was not a violation of § 8(a)(1). Petitioner also disputes the allegations raised in the objections to the election, including the allegation that president Ketcham's election-eve speech was violative of § 8(a)(1).

12. Griffiths testified that anti-union animus did not motivate his extensive grievance solicitation program. He claimed that he acted pursuant to president Ketcham's directive issued the day before the Union's first organizational meeting. The A.L.J. found to the contrary and the Board affirmed. We note that as the A.L.J. considered all relevant factors and sufficiently explained his credibility resolution, we may not disturb his determination. *NLRB v. Armcor Industries, Inc.*, 535 F.2d 239, 241 n. 3 (3d Cir. 1976). *See, Altemose Con-*

also found that Griffiths made specific promises to the employees to give them the impression that a union was not needed. He told employees to file their grievances with him and he would remedy them if meritorious. He told some employees that he was capable of running the plant without outside interference, more or less, without a union.

Griffiths admitted talking to the employees about their union sympathies. In some instances Griffiths asked the employees to support the Company in the forthcoming election. He told several employees that they did not need a union. The A.L.J. found this questioning constituted coercive interrogation designed to persuade employees not to vote for the Union.[13]

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struction Co. v. NLRB, 514 F.2d 8, 16 (3d Cir. 1975); *NLRB v. Erie Marine, Inc.,* 465 F.2d 104, 106 n. 3 (3d Cir. 1972); *Standard Dry Wall Products, Inc.,* 91 NLRB 544, 545 (1950), *enforced,* 188 F.2d 362 (3d Cir. 1951).

We also note that though the solicitation of grievances is not in and of itself an unfair labor practice, it becomes one in violation of § 8(a)(1) when the grievance solicitation is accompanied by an express or implied promise to remedy the grievance if the Union is rejected, or if such promise otherwise serves as an inducement to vote against the Union. *See, Landis Tool Co., Division of Litton Industries v.* NLRB, 460 F.2d 23, 24-25 (3d Cir.), *cert. denied,* 409 U.S. 915, 93 S.Ct. 237, 34 L.Ed.2d 177 ,1972). The Board found that the solicitation of grievances in this case was accompanied by implicit or explicit promises of benefit and was, therefore, violative of § 8(a)(1).

13. It is a violation of § 8(a)(1) for an employer to interrogate employees about their union sympathies when doing so suggests to the employees that the employer may take action against them because of their pro-union sympathies. *See, NLRB v. Clapper's Manufacturing, Inc.,* 458 F.2d 414, 417-418 (3d Cir. 1972); *NLRB*

The A.L.J. found that Griffiths granted an employee named Gary Figard an immediate benefit in order to discourage him from voting for the Union. Griffiths asked Figard what he thought about the Union. When Figard told Griffiths that he had not yet made up his mind, Griffiths solicited his grievances. Figard told Griffiths he needed a jog button on his automatic press. He said he would also like to have his pay rate stabilized. The next day Figard was placed on straight pay, which had the effect of stabilizing his rate, and remained on it until November, after the election, when other employees complained about his preferential status. Within three days a jog button was placed on his automatic press.[14]

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v. S. E. Nichols-Dover, Inc., 414 F.2d 561, 563 (3d Cir. 1969), *cert. denied*, 397 U.S. 916, 90 S.Ct. 919, 25 L.Ed. 2d 96 (1970). In *NLRB v. Camco, Inc.*, 340 F.2d 803, 804-805 n. 6 (5th Cir.), *cert. denied*, 382 U.S. 926, 86 S.Ct. 313, 15 L.Ed.2d 339 (1965), the court noted that the test is not whether the employees were actually coerced, but whether the questioning tended to be coercive. *See, NLRB v. Colonial Knitting Corp.*, 464 F.2d 949, 951 (3d Cir. 1972); *NLRB v. Barney's Supercenter, Inc.*, 296 F.2d 91, 94-95 (3d Cir. 1961).

14. Griffiths testified that these benefits were not conferred to encourage Figard to vote against the Union. The A.L.J.'s credibility finding considered all relevant factors, and he sufficiently explained his credibility resolution. We may not disturb his finding. *See*, n. 12, *supra*.

As the Supreme Court noted in *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409, 84 S.Ct. 457, 460, 11 L.Ed.2d 435 (1964), the law prohibits employer "conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect."

Griffiths told one employee, who was as yet undecided about the way he should vote, that the building would not be worth much without the Company.[15] This the A.L.J. found was an implied threat to close the plant in the event the Union won the election.[16]

The A.L.J. concluded that Hedstrom, in the person of William Griffiths, "violated Section 8(a)(1) of the Act by interrogating employees about their union activities, membership, and desires, by soliciting their grievances, and promising and granting them improvements in their working conditions, and by threatening to close the plant, in order to deter them from selecting the Union as their collective-bargaining representative." Appendix, 12a.

Similarly, the A.L.J. found that lower-level management pursued a policy of grievance solicitation and employee interrogation about union sympathies. In many of these cases, however, the employees who were questioned wore union badges or were known union supporters. This was true as well of some of the employees with whom Griffiths spoke. Nonetheless, some uncommitted or undecided employees were approached and interrogated on these matters. The lower-level supervisors interrogated employees about their union membership and conveyed the threat that if the Union won

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15. Griffiths denied this statement. The A.L.J.'s credibility findings were properly supported, and we pay deference thereto. *See,* n. 12, *supra.*

16. It is clear that promises of benefit or threats of reprisal to discourage union votes are violative of § 8(a)(1). *See, e. g., Carlisle Paper Box Co. v. NLRB,* 398 F.2d 1, 4-5 (3d Cir. 1968). *See also, NLRB v. Armcor Industries, supra,* 535 F.2d at 242-243; *NLRB v. Frank C. Varney Co.,* 359 F.2d 774, 775 (3d Cir. 1966).

the election, the employees would lose their benefits, and the Company might enforce its rules more strictly.[17]

Supervisor Randy Whetstone, a former union steward in Fitchburg, told one employee that the union in Fitchburg stifled Company growth there. He told another employee that two Fitchburg employees started the 13-week wildcat strike so that they could see the World Series. He promised employee Alfred Wertz a better job if he voted against the Union. The A.L.J. found these statements were coercive of employee § 7 rights.

Another supervisor, Inda Logue, told employee Thomas Lewis that he should give the Company a chance because "You don't want to be standing out in a picket line half of the winter." Appendix, 110a. She warned other employees that if the Union won the election, it would strike.

Supervisor Robert Will was found to have conveyed the impression of surveillance of employee concerted activity when he asked employee Michael Hilmer why on the day he reported sick from work, he showed up at a union meeting.[18] Hilmer, however, answered unre-

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17. Statements which threaten loss of benefits if the Union wins the election and which are not carefully phrased to demonstrate that the statement is merely a prediction based on objective fact are violative of § 8(a)(1). *See, NLRB v. Erie Marine, Div. of Litton Industries,* 465 F.2d 104, 106 (3d Cir. 1972); *NLRB v. Marsh Supermarkets, Inc.,* 327 F.2d 109, 111 (7th Cir. 1963), *cert. denied,* 377 U.S. 944, 84 S.Ct. 1351, 12 L.Ed. 2d 307 (1964); *NLRB v. Barney's Supercenter, Inc.,* 296 F.2d 91, 94-95 (3d Cir. 1961).

18. Surveillance which suggests coercion, or which inhibits the exercise of § 7 rights, violates § 8(a)(1). *See, e. g., NLRB v. Armcor Industries, Inc., supra,* 535

sponsively that he would make up his own mind about the Union. Other supervisors were found to have committed similar unfair labor practices.

In the objections to the election, there was an unfair labor practice charge made against president Ketcham for impliedly threatening, in his election-eve speech, to close the plant if the Union won the election.[19] At 10:00 p. m. on March 26, president Ketcham had delivered an election-eve speech to the night, or second, shift, and on March 27 he delivered the same speech before the morning, or first, shift.[20] The A.L.J. found that Ketcham did not deviate, except for some opening pleasantries, from his prepared text, which was admitted into evidence.[21] Appendix, 402a-427a. Ketcham noted in his speech that this was the third representation election in 7½ years. He reviewed the Company's record and listed its benefits. He also talked about the

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F.2d at 242-243; *NLRB v. Clapper's Manufacturing, Inc., supra,* 458 F.2d at 417-418; *NLRB v. S. E. Nichols-Dover, Inc., supra,* 414 F.2d at 563.

19. The three objections to the election can be distilled to two allegations, only one of which charges a violation of § 8(a)(1). The other charges that the election-day editorial of the Bedford Gazette helped undermine the laboratory conditions necessary for a free election.

20. The A.L.J. found that Ketcham delivered these speeches more than 24 hours before the election so as to comply with the Board's *Peerless Plywood Company,* 104 NLRB 427 (1953), rule, which prohibits election speeches to mass assemblies of employees within 24 hours of an election. The parties do not dispute this.

21. His credibility findings were based on a consideration of all relevant factors and sufficiently explained. We, therefore, may not disturb them. *See,* n. 12, *supra.*

Company's plans for growth. He related that there was 18% unemployment in Bedford County according to one newspaper. He added, "Right now, Hedstrom is hiring—*your Company's prosperity is your best job security.*" Appendix, 420a. Ketcham enumerated six reasons why the Company opposed the Union. In the fifth reason, he said:

> "This Company has already had experience with a union—in Fitchburg. It was an *unhappy experience* for us, and we honestly think it was for our hourly employees also. Unions aren't always what they are cracked up to be." (Emphasis added.) Appendix, 426a.

The A.L.J. found that Ketcham in his speech did impliedly threaten to close the plant if the Union won the election. In arriving at this finding, the A.L.J. considered the fact that the entire community of Bedford, especially those in the plant, were aware that Hedstrom left Fitchburg to avoid the union. Therefore, the A.L.J. observed, everyone in the room knew what Ketcham meant by the "unhappy experience." The A.L.J. said (Appendix, 7a):

> "It is no wonder that, by the time of the hearing, the employees were remembering a specific statement by Ketcham that they now had the jobs formerly held by Fitchburg employees because of the latter's unhappy experience with a union, even though those were not the precise words Ketcham used. That was the message Ketcham intended to convey by the words he did use. 'Unhappy experience' became 'bitter experience' in the employees' memories because that was the phrase placed in the mouth of an unidentified manager of the

> plant by the Bedford Gazette. An allusion to the loss of jobs in Fitchburg became a specific statement by Ketcham because they got the message Ketcham intended to send them. I find, therefore, that when Ketcham stated the fifth of [Hedstrom's] six reasons for not wanting a union in Bedford, [Hedstrom] impliedly threatened to close the plant in the event its employees selected the Union as their collective-bargaining representative, thereby violating Section 8(a)(1) of the Act."[22]

All of the foregoing violations as found by the A.L.J. were affirmed by the Board. In light of petitioner's concessions with respect to most of these particular § 8(a)(1) unfair labor practices, *see* fn. 11, we need merely note that the Board's findings of § 8(a)(1) violations are supported by substantial evidence in the record as a whole, 29 U.S.C. § 160(e) (1970); *see, Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951); *NLRB v. Armcor Industries, Inc., supra,* 535 F.2d at 242; *Mon River Towing, Inc. v. NLRB,* 421 F.2d 1, 9-10 (3d Cir. 1969).

However, we do not find substantial evidence in the record as a whole to support the Board's conclusion that Ketcham threatened to fire employee Norman Anderson in violation of § 8(a)(1).[23] The Board, by a 2 to 1 vote with Chairman Murphy dissenting, reversed the A.L.J.'s finding of no § 8(a)(1) violation with respect to the conversation between Ketcham and Anderson. The

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22. *See,* fn. 21.

23. It is a violation of § 8(a)(3) of the Act to discharge an employee because of his union activity. No discharge occurred and no § 8(a)(3) violation was charged.

A.L.J. rejected Ketcham's version of the facts, and relied on Anderson's version. He found, nonetheless, that in view of the cordial nature of the conversation and the setting, Anderson would not have been coerced.

The testimony demonstrates that on March 16, 1974, twelve days before the election, the Company held its periodic dinner-dance at the Bedford Elks Club.[24] During this affair, Ketcham talked with Anderson, a press operator, late in the evening at the bar. Ketcham knew Anderson personally The two men discussed Anderson's personal life and some of his troubles. They discussed deer hunting, softball, and Anderson's family. According to Anderson, Ketcham asked him what his biggest "gripe" was. Anderson replied that it was that he was losing money under the incentive system every time the Company installed a new piece of equipment. Anderson admitted that the conversation was informal and friendly.

Anderson testified that Ketcham told him that he "could run the Company with or without a damn union; and then, he [Ketcham] said that if he had been president of the Company the first three times that this union was brought up, he would have fired my f..... ass." Appendix, 83a. Ketcham told Anderson that he was an abrasive sort who was always kidding everyone. Anderson's testimony on cross-examination did indicate that he and Ketcham were on friendly terms and that they socialized together. Appendix, 85a. Anderson's wife sat at Ketcham's table with Ketcham's wife at the dinner-dance. He also admitted that Ketcham did counsel him in a fatherly way and urged him to have more self-

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24. Neither the A.L.J. nor the Board found that the dinner-dance was timed to affect the election.

confidence. He added that Ketcham told him whether he was for the Union or not was his own business. Ketcham assured Anderson that he was judged only on what he did, and that was excellent. Appendix, 321a.

The A.L.J. found:

> ". . . Ketcham did not ask Anderson about his gripes in order to solicit his grievances. The incentive system came up as two men talked shop. They had shed, at least for a few hours, their roles as boss and worker. They were communicating with each other as equals under social, not plant, conditions. Ketcham did not warn Anderson that he was in danger of being fired because of his pro-union stance in the current campaign. On the contrary, Ketcham was making the precise point that, while Anderson's abrasive personality might have gotten him into trouble during earlier union drives, he had nothing to worry about this time with Ketcham in charge of [the Company]." Appendix 8a.

The Board reversed the A.L.J.'s finding. It held that notwithstanding the nature of the conversation, the comment was a threat to discharge Anderson if he engaged in union activity. It found the threat to fire Anderson was given emphasis by the vulgar epithet. Chairman Murphy dissented for the reasons stated in the A.L.J.'s opinion and because the majority had failed to place the comment in the context of a frank and candid discussion.[25] Any threat that might have been

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25. The Board in its opinion set forth the Chairman's dissent. "Like the Administrative Law Judge, the Chairman concludes that Ketcham merely meant to inform Anderson that, while in the past the latter's union

conveyed by Ketcham's remark, that had he been president the last three times the employees tried to unionize, he would have fired Anderson, was totally removed by his explicit assurance that Anderson was judged solely on his work, which was excellent. The Board, we believe, unduly emphasized the "vulgar epithet." It is not unusual for two men drinking at a bar to use such expressive, vulgar language. In the context of the circumstances, the friendly rapport the two had, and the assurances given, it is clear that there is not substantial evidence in the record as a whole to support the Board's finding that the conversation violated § 8(a)(1) of the Act.[26] Consequently, we cannot sustain that portion of the Board's order which relies upon that determination.

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activities would have prompoted his discharge, that no longer was the case even though Ketcham now was in a position to act. The Chairman believes that her colleagues have completely disregarded the frank and candid nature of the two men's conversation in which deceit and rancor clearly played no part, and, more significantly, have divorced the allegedly threatening statement from other remarks of Ketcham, particularly the one assuring Anderson that his continued employment rested solely on his work performance and nothing else." She added that this assurance removed any threatening nature the conversation might otherwise have had. Appendix, 43a n. 7.

26. We note that it is within our province to reverse a Board finding of a § 8(a)(1) violation where "the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490, 71 S.Ct. 456, 466, 95 L.Ed. 456 (1951).

Appendix D.

§ 8(a)(5): UNFAIR LABOR PRACTICES

The Board reversed the A.L.J.'s decision not to permit the amendment of the complaint to include a § 8(a)(5) charge.[27] The Board then found that the Company violated § 8(a)(5) by refusing to recognize and bargain with a majority status union. We cannot sustain the Board's finding of a § 8(a)(5) violation.

Respondent concedes that the Union did not represent a majority of the employees in the unit on February 12, 1974, the day it sought recognition from the employer. *See,* respondent's brief, p. 44 n. 7. Respondent contends that the employer's duty to recognize the Union's claim of majority representation is premised on a "continuing demand" for recognition. The General Counsel argues that once the employer is notified that a union demands recognition and that its demand is continuing, the employer risks a § 8(a)(5) violation if the union sometime thereafter attains majority status and the employer does not recognize and bargain with it. We reject this concept of "continuing demand." Respondent conceded at oral argument that the Company was never notified subsequent to the original recognition demand that the Union had finally attained majority status.

The General Counsel relies most heavily upon *Local No. 152 v. NLRB* 120 U.S.App. D.C. 25, 343 F.2d 307,

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27. The Board found that though the A.L.J. would not permit the Union to allege a § 8(a)(5) violation, all the elements of a § 8(a)(5) violation were fully litigated by the parties. Hedstrom strenuously contested majority status. *See,* Board opinion, Appendix, 41a n. 2. We believe the Board did not act beyond its authority in considering the § 8(a)(5) charges.

310 (1965), where in the District of Columbia Court of Appeals held:

> "... An employer violates Section 8(a)(5) when, as here, it rejects a Union's bargaining request made in the honest but mistaken belief that a majority had been obtained, without questioning the Union's representative status, and the Union does obtain a majority shortly after such request."

In *Local No. 152* there was evidence (1) that the union honestly but mistakenly believed it represented a majority of the employees in the unit when it sought recognition, and one week thereafter actually attained majority status, (2) the company responded that it was not interested in talking to the union, (3) the company did not in any manner dispute the union's claim of majority representation, (4) the company ignored the union's demand for recognition, and (5) the union petitioned the Board for an election. The court reasoned that under these circumstances "[t]he Board was justified in construing the Union's conduct described above as a continuing demand for recognition *in circumstances where a formal demand in light of the Company's prior peremptory refusal would have been useless.*" (Emphasis added.) 343 F.2d at 310. Thus the court in *Local No. 152* recognized the concept of "continuing demand" only in cases where there had been a prior peremptory refusal.

In *NLRB v. Kostel Corp.*, 440 F.2d 347, 350—351 (7th Cir. 1971), the court recognized an initially invalid demand as an adequate basis for a "continuing demand," where the company requested that the matter of representation be deferred for more than three weeks during which time the union did in fact reach majority status. The court reasoned that it was unnecessary to

require another demand on the deferred date. When the company actually considered the union's claim of majority status, the union did in fact represent a majority of the employees. Consequently, the employer's failure to recognize and bargain at that point could be the basis for a § 8(a)(5) violation.

In *NLRB v. Arkansas Grain Corp.*, 390 F.2d 824, 828 (8th Cir. 1968), the court rejected the District of Columbia Circuit's concept of "continuing demand," saying:

> "We hold that an employer, *irrespective of his motivations,* does not violate Section 8(a)(5) by refusing to recognize and bargain with a union, *if in fact the union at the time of the demand for recognition does not represent a majority of the employees."* (Emphasis added.)

The court reached this conclusion irrespective of the employer's good faith doubt as to the union's majority, because the employer's motivations were only relevant once in fact majority representation existed.[28] Because there was no valid demand, a fortiori, there could be no "continuing" demand. The court, though rejecting the broader concept of "continuing" demand, did however observe that the facts demonstrated that the union's conduct belied the assertion of an "honest but mistaken" claim of majority status.[29]

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28. *But see, NLRB v. Gissel Packing Co., supra,* 395 U.S. at 594, 89 S.Ct. 1918.

29. The Union's demand for recognition stated that its claim should be construed as "continuing." This, the court felt, demonstrated some doubt on the part of the Union as to the validity of its claim.

In the case at bar, the Union demanded recognition on February 12, when, in fact, it did not represent a majority of the employees in the unit. Unlike the "continuing demand" cases. Hedstrom did respond to the demand, Appendix, 397a, fn. 7, *supra,* and did express doubts as to the Union's majority status by suggesting that it seek an election. The recognition demand was not ignored, and the Company did not refuse to talk to the Union about the matter.[30] Nor did the Company put the matter off, as the employer had done in *Kostel.* Therefore, we are not presented with a peremptory refusal case.

We cannot accept any concept of continuing demand which requires an employer either to recognize a minority status union, or to risk a § 8(a)(5) violation in the event the minority union attains majority status sometime after the demand, unless it gives renewed notices to the employer that it has attained majority status since the last demand. If an employer were to recognize and bargain with a union which does not represent a majority of the employees in the appropriate unit, it commits an unfair labor practice in violation of § 8(a)(2) which prohibits an employer from aiding any minority union. *International Ladies Garment Workers' Union. AFL-CIO v. NLRB,* 366 U.S. 731, 81 S.Ct. 1603, 6 L.Ed.2d 762 (1961). Under circumstances such as appear in this case, if we were to accept the Union's position that its invalid demand should be accepted by the employer because subsequent to the demand, and unbeknown to the employer, the Union in fact achieved

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30. However, the Union did state in its demand letter of February 12 that it was prepared to offer proof of its majority status. Appendix, 396a.

majority status, we would force the employer to tread the fine line between § 8(a)(2) and § 8(a)(5). If at the time an initial demand is made, the union lacks majority status, the union must notify the employer when in fact it has obtained a card majority from the employees in order to effectuate a valid demand for recognition. Only after such a valid demand does the employer's obligation to recognize the union arise. Here there admittedly was no valid demand made. We therefore, cannot sustain the Board's finding of a § 8(a)(5) violation.

THE REMEDY

The Board, contrary to the A.L.J., ruled that a bargaining order was necessary because of the pervasive nature of the unfair labor practices. Our inquiry into the appropriateness of such a remedy must commence with a discussion of *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969).

In *Gissel* the Supreme Court formulated criteria for determining when a bargaining order is appropriate. The Court set forth three categories. The first is the "exceptional" case marked by "outrageous" and "pervasive" unfair labor practices. In such cases, despite the absence of majority status, the union would be entitled to a bargaining order where the coercive effects of the unfair labor practices could not be eliminated by traditional remedies. The second category is where the case is less extraordinary and "marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." 395 U.S. at 614, 89 S.Ct. at 1940. The Court continued:

"... The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of easing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue . . .." 395 U.S. at 614—615, 89 S.Ct. at 1940.

The third and final category presents the case "of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order." 395 U.S. at 615, 89 S.Ct. at 1940.

General Counsel, respondent here, conceded before the A.L.J. that this was not a *Gissel* category 1 case, but urged the A.L.J. to find it a category 2 case.[31] *See,* Appendix, 32a. The A.L.J., however, found:

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31. The General Counsel's position is the same on appeal.

> "... All of the conversations, whether they involved the minor supervisors or Griffiths himself, which did not raise the specter of Fitchburg are trivial by comparison. In and of themselves they do not rise to the level of the *Gissel* [category 2] standard. Do the implied threat to close the plant in Ketcham's election eve speech and the conversations specifically about Fitchburg in which charges were rung on the same theme boost this proceeding into the Supreme Court's second category? I think not." Appendix, 34a.

The Board reversed the A.L.J. and found that this was a second category case. The Board must have found that though the unfair labor practices were not so outrageous and pervasive as to constitute a category 1 case, they were more than minimal and were pervasive. It also found that at some point before the election the Union had attained majority status which the unfair labor practices dissipated. Appendix, 46a.

We begin with the issue of majority status, which is a necessary element of a second category case. The A.L.J. found only 123 valid authorization cards. The Board, in reversing the finding of the A.L.J., found that the Union had obtained 125 valid authorization cards by February 15, which constituted exactly a majority of the 249 employees in the unit. The Board found that the Union's majority grew to 129 valid cards by March 4.[32]

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32. The Union offered 132 cards at the hearing. The Board in one part of its opinion said that it found 128 valid cards, but its discussion of the cards indicates that it found 129 valid. In either case, the Board found that the Union obtained valid cards from a majority of the employees in the unit.

In *NLRB v. Gissel Packing Co., Inc., supra,* 395 U.S. at 584, 89 S.Ct. at 1925, the Supreme Court observed:

> "... Under the *Cumberland Shoe* [*Corp.,* 114 NLRB 1268 (1963), *enforced,* 351 F.2d 917 (6th Cir. 1965), and reaffirmed in *Levi Strauss & Co.,* 172 NLRB 732 (1968), *enforced,* 142 U.S.App.D.C. 337, 441 F.2d 1027 (1970)] doctrine, if the card itself is unambiguous (*i. e.,* states on its face that the signer authorizes the Union to represent the employee for collective bargaining purposes and not to seek an election), it will be counted unless it is proved that the employee was told that the card was to be used *solely* for the purpose of obtaining an election."

In fact, the Court recognized that even if the employee were told that his card would be used to get an election first, this would not deprive the card of its validity for representation purposes. The Court said:

> "... we think it sufficient to point out that employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature." 395 U.S. at 606, 89 S.Ct. at 1936.

However, the Court warned that "trial examiners should not neglect their obligation to ensure employee free choice by a too easy mechanical application of the *Cumberland Shoe* rule. We also accept the observation that employees are more likely than not, many months after a card drive and in response to questions by company

counsel, to give testimony damaging to the union, ..." 395 U.S. at 607—608, 89 S.Ct. at 1937.

The card used by the Union in this case was unambiguous in its language, as the A.L.J. and Board found.[33] We conclude that the Board properly found under the *Gissel* test that at some point prior to the election the Union had attained majority status.[34]

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33. The card read:

"YES I WANT THE IAM

I, the undersigned, an employee of (company)

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hereby authorize the International Association of Machinists and Aerospace Workers (IAM) to act as my collective bargaining agent with the company for wages, hours and working conditions. It is my understanding that I will be invited to join the IAM." Appendix, 395a.

34. Petitioner asks this Court to sustain the A.L.J.'s determinations, arguing that they are based on credibility findings. We conclude, however, that the A.L.J.'s findings were based on his interpretation of the law and the testimony as applied thereto, but not on a weighing of credibility. To the extent that contradictory statements were made by witnesses, we have deferred to the credibility findings of the A.L.J.

The Board found the cards of Clair Black, Richard Cloud, Gary Miller, Robert Roland, and Edward Will to have been valid, along with the lost card of Warren Hammar. Though these men were told that their cards would be used to get an election, most were not told that that was the only purpose of their cards. Most of them could not recall who told them their cards would be used to obtain an election. Only Edward Will indicated that he was told by a union adherent that the sole purpose of his signing an authorization card was to get an election. We, therefore, conclude that the Board erred with respect to this card.

Appendix D.

Our next inquiry must be into the nature and extend of the unfair labor practices, and into their past effect upon elections and the likelihood of their recurrence in the future. The A.L.J. found:

> "... Almost all of the conversations here were one-on-one. Many can be described as casual. Viewed separately, most of them do not measure up to the coercive level of [an] 8(a)(1) violation. This is especially true of the minor supervisors, that is, everybody below the level of Ketcham, the president, and Griffiths, the top in-plant boss." Appendix, 33a.

The A.L.J. concluded that the Company committed numerous and unisolated unfair labor practices, but he did not find they were "extensive" within the meaning of *Gissel*. The A.L.J. did not explain this distinction. However, he did explain that with regard to the "past effect on election conditions" the testimony of the witnesses weighed against a bargaining order. He said:

> "... Generally, they [the employees] pictured themselves as either ignoring the supervisors' efforts to affect them or giving as good as they got in the conversation." Appendix, 33a.

We agree with petitioner that the card of Paul E. Turner should be rejected because he was told by the union adherent who solicited his card that it would be used only to get an election. Consequently, of the 129 cards found valid by the Board, we determine that only two were incorrectly counted. We, therefore, conclude that sometime prior to the election the Union had 127, a majority, of the employees designate it as their collective bargaining representative.

As noted above, the A.L.J. found that the unfair labor practices which did not raise Fitchburg were trivial. Appendix, 34a. Consequently, his characterization of the case, though specifically not stated, was as a *Gissel* category 3 case.

The Board, in reversing the A.L.J., made no specific findings with respect to the past effect or the likelihood of recurrence of these unfair labor practices. It merely indicated that the unfair labor practices were numerous and extensive.

The Board found that the unfair labor practices constituted "pervasive misconduct, directly affecting all of the employees, created an atmosphere hostile to the Union and its adherents and was clearly intended to, and did in fact, dissipate the Union's majority status among the employees." Appendix, 48a. The Board's conclusion was that this case fell into the second *Gissel* category, and a bargaining order was necessary.

As this Court pointed out in *NLRB v. Armcor Industries, Inc., supra,* 535 F.2d at 244, the Board is required to "clearly explicate its reasons for issuing a bargaining order *and include findings as to why a fair election cannot be held.*" (Emphasis added.) Judge Rosenn, writing for the majority in *Armcor,* continued:

> "... *Gissel* itself contemplates that the Board 'must make "specific findings" as to the immediate and residual impact of the unfair labor practices on the election process and that the Board must make "a detailed analysis" assessing the possibility of holding a fair election in terms of any continuing effect of misconduct, the likelihood of recurring misconduct, and the potential effectiveness of or-

> dinary remedies.' *Peerless of America, Inc. v. NLRB,* 484 F.2d [1108] 1118 (7th Cir. 1973). *See NLRB v. Gissel Packing Co.,* 395 U.S. at 615—16, 89 S.Ct. [1918] 1940—41 .... In light of the general and highly desirable practice in industrial relations of selecting bargaining representatives through traditional election processes, a rule requiring the Board to set forth a reasoned analysis justifying a bargaining order under *Gissel* is salutary." 535 F.2d at 244.

The Board in *Armcor* had failed to indicate specifically under which of the first two *Gissel* categories it had classified the case. Here, the Board has gone that far, but no further. It has failed to make the findings required by *Gissel* and deemed essential for purposes of appellate review in *Armcor.* In *Armcor,* we remanded the case for specific findings where the Board had merely characterized the unfair labor practices as "extensive and egregious" and "designed to interrupt, thwart, destroy the employees' support of the union, and make the holding of a fair election impossible." 535 F.2d at 244. As in *Armcor,* the Board's findings here have been conclusory.[35]

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35. The Board stated:

> ". . . Rather, we find that there is little or no likelihood that a second and fair election could be conducted in the face of the extensive and far-reaching unfair labor practices committed by [Hedstrom], and that, hence, a bargaining order is warranted to protect the employees' representational rights." Appendix, 44a.

The Board did not indicate the reasons it concluded a fair rerun election unlikely, nor did it assess the past history of employer interference. The Board found many § 8(a)(1) violations and consequently concluded that the only remedy was a bargaining order.

Both the A.L.J. and the Board placed heavy reliance upon the Bedford Gazette's election-day front page editorial, which they found, though not a violation of § 8(a)(1)[36] disrupted the laboratory conditions necessary for an election.[37] The Board found that the edi-

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36. "It is not necessary that conduct which interferes with the freedom of choice in an election actually constitute an unfair labor practice." *NLRB v. Tennessee Packers, Inc., Frosty Morn Division,* 379 F.2d 172, 181 (6th Cir. 1967), *cert. denied,* 389 U.S. 958, 88 S.Ct. 338, 19 L.Ed.2d 364 (1969). *See also, Independent, Inc., d/b/a Daily Advertiser v. NLRB,* 406 F.2d 203, 208 (5th Cir. 1969). Here there was a mere benefit bestowed on the Company by a third party during the election campaign which will not warrant a finding of unfair labor practice. *NLRB v. Mayer,* 196 F.2d 286, 290 (5th Cir. 1952).

37. The A.L.J. found (Appendix, 30a-31a):

> "I gather from the fact he [the Regional Director] did not allege publication of the story as an unfair labor practice that the General Council concedes that agency must be shown before the activities of some person or institution not obviously associated with an employer can be found to be an unfair labor practice and agrees that, here, there is no showing [Hedstrom] either authorized or ratified the story. Therefore, whether the Bedford Gazette was acting as an agent of [Hedstrom] is not an issue I have to resolve."

However, the A.L.J. in dictum stated that he believed Ketcham was the article's source of the information for the prediction of adverse consequences if the Union won the election. The A.L.J. believed that this could constitute the requisite finding of agency to attribute the article to the Company and thereby provide a basis for a § 8(a)(1) violation. *See, NLRB v. Mayer,* 196 F.2d 286, 290 (5th Cir. 1952).

Edward K. Frear, editor of the Gazette and author of the article, refused to divulge his management source. Ketcham admitted that he was the source for only the information concerning wages and benefits.

torial conveyed the threat that if the Union won the election, the Company might move. Additionally, the Board found that the article implied that plant expansion hinged on management victory in the representation election. However, neither the Board nor the A.L.J. assessed what impact the article might have on a fair rerun election. The Board in conclusory terms sustained the Union's objection to the election with respect to it.

Unlike *Armcor,* we only have § 8(a)(1) violations present in the instant case. Though, as the General Counsel has argued, § 8(a)(1) violations in and of themselves may have enough of a disruptive effect on an election to warrant a bargaining order, *see, NLRB v. Arkansas Grain Corp., supra,* 390 F.2d at 830, we have no way of evaluating that absent Board findings. Certainly, the Board has not made "specific findings," nor has it given us "a detailed analysis" of the lingering effect of the unfair labor practices and the likelihood of a fair rerun election.

There are additional reasons for requiring a remand here. First, we have reversed the Board's finding of a § 8(a)(5) violation, and we have also been unable to find substantial evidence to support one of the Company's allegedly more flagrant § 8(a)(1) violations.[38]

There was no specific holding with respect to the Bedford Industrial Development Council, which was also alleged to have disrupted laboratory conditions.

38. The Court in *NLRB v. General Stencils, Inc.,* 438 F.2d 894, 902 (2d Cir. 1971), noted:

> ". . . the Board should explain in each case just what it considers to have precluded a fair election and why, and in what respects the case differs from others where it has reached an opposite conclusion. Detailed explication of this sort is peculiarly neces-

We also conclude that the Board failed to assess the impact the Gazette article had on the election and the chances for a fair rerun election. In addition we note, as did counsel for the Company, that the unfair labor practices occurred over three years ago. The Board has not considered what effect this passage of time would have on the possibility of having a fair rerun election. *See, NLRB v. Armcor Industries, Inc.*, 535 F.2d at 246.[39] We cannot conclude that because the Company left Fitchburg, in part to avoid a union, this fact alone justifies a bargaining order. There is no indication that traditional remedies such as cease-and-desist orders, the mailing or the reading of notices to employees during

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sary because of the possibility, which has here become an actuality, that a reviewing court will vacate one of the § 8(a)(1) findings on the 'totality' of which the Board relied to justify a bargaining order, and the consequent possible need for a remand unless the court can be satisfied that the error did not affect the command to bargain."

39. The record demonstrates that in three previous unionizing attempts at Bedford, the unions seeking to represent Hedstrom employees never successfully demonstrated to the Board unfair labor practices. One previous unionizing attempt did not result in an election. In one of the two elections no objections were even raised. Only in 1968 is there a record of the union vote, and it demonstrates that the union had been overwhelmingly defeated. *See* fn. 8, *supra*. The present unionizing attempt was significantly more successful, which indicates that with the passage of time Hedstrom employees have become more interested in unionization. Whether this fact would indicate that three additional years may have dissipated the effect of the unfair labor practices and have even added to the Union's strength is a factor to be considered by the Board. *But see, NLRB v. Gissel Packing Co., supra,* 395 U.S. at 611 nn. 30-31, 89 S.Ct. 1918.

plant time, the posting of notices on Company billboards, or the granting to the Union of access to employees during work time at the plant, or a court injunctive order under § 10(j) (29 U.S.C. § 160(j)) as a last resort, will not remedy the unfair labor practices charged here.[40]

We conclude that all other issues raised are without merit and, therefore, require no discussion. Because the Board has failed to evaluate the unfair labor practices in light of the considerations enunciated in *Gissel,* and in light of our own ruling with respect to certain unfair labor practices, this case will be remanded to the Board for further proceedings consistent with this opinion.

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40. As the Court in *NLRB v. Gissel Packing Co., supra,* 395 U.S. at 602, 89 S.Ct. at 1934, noted:

> ". . . The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory—indeed the preferred —method of ascertaining whether a union has majority support."

Appendix E

Hedstrom Company, a subsidiary of Brown Group, Inc. and International Association of Machinists and Aerospace Workers, District No. 98, AFL-CIO. Cases 6-CA-7619 and 6-RC-6762

May 12, 1976

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS FANNING AND PENELLO

On November 19, 1975, Administrative Law Judge Benjamin K. Blackburn issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Respondent filed exceptions and supporting briefs, and the General Counsel filed a statement in answer to the Respondent's exceptions.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and

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1. We deny the General Counsel's motion to strike portions of Respondent's brief. Thus, Respondent was not required, in the circumstances of this case, to file specific exceptions to the Administrative Law Judge's finding that the Union lacked a card majority among the employees inasmuch as that finding supported Respondent's position.

has decided to affirm the rulings,[2] findings,[3] and con-

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2. At the commencement of the hearing, the General Counsel moved to amend the complaint to include an allegation that Respondent violated Sec. 8(a)(5) of the Act based on the Board's decision in *Trading Port, Inc.*, 219 NLRB 298 (1975), which issued after the complaint in the instant case but prior to commencement of the hearing. The Administrative Law Judge denied the motion. In the circumstances of this case, we find that the Administrative Law Judge erred in denying the General Council's motion. Thus, while the complaint did not allege a violation of Sec. 8(a)(5) of the Act, we note that the original charge did contain such an allegation and that as discussed, *infra,* all of the elements necessary to prove a violation of Sec. 8(a)(5) of the Act were fully litigated and proved during the normal course of the instant hearing in connection with the General Counsel's seeking a bargaining order to remedy the unfair labor practices alleged in the complaint. We also note that Respondent vigorously contested the majority status of the Union. In these circumstances, we find that the Respondent was on notice that it might have to recognize and bargain with the Union as a remedial measure if the unfair labor practice allegations were sustained, notwithstanding the refusal of the Administrative Law Judge to permit the complaint's amendment to allege the legal conclusion of an 8(a)(5) violation based thereon.

3. The General Counsel and the Respondent have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

clusions[4] of the Administrative Law Judge to the extent consistent herewith and to adopt his recommended Order as modified herein.

1. The Administrative Law Judge found, and we agree, for the reasons stated by him, that the Respondent violated Section 8(a)(1) of the Act by expressly and impliedly threatening to close its plant in the event the Union won the election;[5] by threatening employees with various other reprisals if they selected the Union as their collective-bargaining representative; by interrogating employees about their union activities, membership, and desires; by promising employees various benefits and granting them benefits if they refrained from selecting the Union as their collective-bargaining representative; by soliciting grievances from employees

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4. The Administrative Law Judge found that Respondent, in the person of William Griffiths, violated Sec. 8(a)(1) of the Act by granting benefits to employees, but he omitted to include provisions related to this finding in his Conclusions of Law and his recommended Order. We have modified the Conclusions of Law and Order, respectively, to reflect that finding.

5. In the circumstances of this case, where the evidence establishes that the entire community was aware of the fact that Respondent had moved its plant from Fitchburg, Massachusetts, to Bedford, Pennsylvania, to avoid collective-bargaining relations with another union, and in light of evidence that threats to close the plant if the Union won the election were made by other supervisors, we agree with the Administrative Law Judge's finding that President Ketcham's reference, during his election eve speech to employees, to the "unhappy experience" of the employees in Fitchburg constituted a subtly implied threat to close the plant in Bedford in the event that the Union won the election. In other words, it was a reminder to them that what happened once before could very easily happen again.

in order to deter them from selecting the Union; and by creating the impression of surveillance of employees' union activities.

2. Contrary to the Administrative Law Judge, we find that the Respondent, through its president, Ketcham, violated Section 8(a)(1) of the Act by threatening employee Norman Anderson. Thus, the record establishes that on March 16, 1974, Ketcham and Anderson became engaged in a conversation at a dinner-dance at the local Elks Club. At one point in the conversation, during a discussion of Anderson's life and hard times, Ketcham pointed out that, notwithstanding Anderson's abrasive manner, he was judged solely on his work, which was good. Ketcham in no uncertain terms said he would have fired Anderson if he had been president of the Company during two previous union organizing attempts. The Administrative Law Judge did not find Ketcham's statement threatening because of the social setting of the conversation and because he viewed Ketcham's remarks as assuring Anderson that he would not be fired during the present union campaign. We disagree. Notwithstanding the nature of the conversation, we find that Ketcham's statement to Anderson constituted a threat to discharge him if he engaged in union activities. It is well settled that threats to employees from friendly supervisors can be no less coercive to employees than threats by a hostile supervisor and can carry a greater aura of reliability and truthfulness. *Rust Craft Broadcasting Company, a wholly owned subsidiary of Rust Craft Greeting Cards, Inc.*, 214 NLRB 59 (1974). Certainly that would be true if the authority speaking was the president of the Company and an official who could clearly make good the threat. We

conclude, therefore, that Ketcham's threat to discharge Anderson violated Section 8(a)(1) of the Act.[6] Contrary to our dissenting colleague, we cannot agree that Ketcham's statements to Anderson, as found by the Administrative Law Judge, amounted to an assurance that Anderson would not be fired during Ketcham's presidency for union activity. Rather, in our opinion, Ketcham's bold assertion, accompanied by a vulgar epithet to give it force, that Anderson would have been fired during the previous union organizational campaigns if Ketcham had then been president, carried with it the clear threat that such a discharge could occur in the future.

3. We agree with the Administrative Law Judge, for the reasons stated by him, that the election held on March 28, 1974,[7] should be set aside. Thus, the Administrative Law Judge found that the requisite election

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6. Chairman Murphy dissents from this finding for the reasons relied on by the Administrative Law Judge in not finding Ketcham's statement to Anderson to be a threat. Like the Administrative Law Judge, the Chairman concludes that Ketcham merely meant to inform Anderson that, while in the past the latter's union activities would have prompted his discharge, that was no longer the case even though Ketcham now was in a position to so act. The Chairman believes that her colleagues have completely disregarded the frank and candid nature of the two men's conversation in which deceit and rancor clearly played no part, and, more significantly, have divorced the allegedly threatening statement from other remarks of Ketcham, particularly the one assuring Anderson that his continued employment rested solely on his work performance and nothing else. That assurance, in the Chairman's view, removed any potentially threatening aspects from the comment of Ketcham that her colleagues find unlawful.

7. All dates are in 1974.

standards were destroyed by the election eve speech by Respondent's president, Ketcham, in which he referred to the "unhappy experience" of Respondent's employees in Fitchburg, Massachusetts (from where, as all the employees knew, Respondent had moved its plant to avoid unionization), and a local newspaper's front page editorial on the day of the election referring to the "bitter experience" of Respondent's Fitchburg employees and linking local development and Respondent's expansion plans with the outcome of the election. In addition, we find that Respondent's numerous violations of Section 8(a)(1) between the time the petition was filed through the day of the election further compromised the Board's election standards and constitute additional grounds for setting aside the election.

However, while we would set aside the election, we disagree with the Administrative Law Judge's finding that Respondent's unfair labor practices did not make the holding of another election impossible. Rather, we find that there is little or no likelihood that a second and fair election could be conducted in the face of the extensive and far-reaching unfair labor practices committed by Respondent, and that, hence, a bargaining order is warranted to protect the employees' representational rights. In so finding, we conclude, unlike the Administrative Law Judge, that a majority of the unit employees, through valid authorization cards, designated the Union as their representative for collective-bargaining purposes.[8]

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8. We find that the appropriate unit is that stipulated to by the parties in the Stipulation for Certification Upon Consent Election approved by the Regional Director in Case 6-RC-6762.

Appendix E.

The record establishes that the Union solicited valid authorization cards from 128 of the 249 unit employees as of March 4 and that majority status was first achieved as of February 15 when it held 125 valid authorization cards. Thus, in addition to the 123 cards found valid by the Administrative Law Judge, we find valid the cards of the following employees:

Clair Black signed an authorization card after reading it on February 6, 1974. Black testified that she was unable to remember who solicited the signed card from her or what was said by the solicitor, but that it was her understanding and general impression from persons unknown and unidentified that the cards were being solicited to obtain an election. Since Black's understanding as to the purpose of the card was not obtained from the solicitor and in view of Black's clear testimony that she had read the card before she signed it, we find Black's card to be valid.[9]

Richard Cloud testified that he signed a card, but was unable to remember who solicited the card and what was said to him at the time by the solicitor. Cloud consistently denied that the solicitor told him that the card would be used solely to get an election, except for a single response to a question propounded by Respondent's attorney which Cloud said he did not understand and to which the General Counsel's objection was sustained. In these circumstances, there is no basis for finding that Cloud signed his card for any purpose other

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9. *Medley Distilling Company, Inc.*, 187 NLRB 84, fn. 8 (1970); *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575, 606-607 (1969).

than that stated thereon[10] and, accordingly, we find Cloud's card valid.[11]

Gary Miller read and signed a card which was solicited by fellow employee Ed Allison. At the time of the solicitation Allison told Miller that the employees "wanted to see if they could get the Union up for a vote" and that "if there was enough of a percentage, then it would come up for a vote." Miller then read and signed the card. While alluding to another use of the card, i.e., an election, Allison did not contradict the plain statement on the card or misstate its purpose. Nor did Allison's failure to state the explicit authorization contained in the card indicate that it was abandoned or ignored. Accordingly, we find Miller's card to be valid.[12]

For similar reasons, we shall count the cards signed by Robert Rollins and Edward Wills. Each testified that he read the card handed to him before signing. Thus, the fact that the solicitors stated to them that the cards would be used to get an election cannot be construed as misrepresenting the purpose of the card as unambiguously stated thereon. Therefore, we find their cards to be valid.[13]

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10. The card reads: "I, the undersigned, an employee of (Company) hereby authorize the International Association of Machinists and Aerospace Workers (IAM) to act as my collective bargaining agent with the company for wages, hours and working conditions. It is my understanding that I will be invited to join the IAM."

11. *Gissel Packing Co., supra.*

12. *Federal Stainless Sink Div. of Unarco Industries, Inc.*, 197 NLRB 489, 494 (1972); *Essex Wire Corportation*, 188 NLRB 397, 414-415 (1971).

13. *Federal Stainless Sink Div. of Unarco, supra* at 494.

In addition to offering signed authorization cards as evidence of the Union's majority, the General Counsel elicited testimony from employee William Hammer that sometime in February he had signed an authorization card which was solicited by and returned to fellow employee David Mock. Mock corroborated Hammer's testimony, but testified that Hammer's card thereafter was lost. Although the best evidence of Hammer's designation of the Union would be his signed card, it is settled that the testimony of an employee is itself probative of a union's majority status in circumstances where the card has been misplaced.[14] Based on the mutually corroborative testimony of Hammer and Mock, we find that Hammer signed a union card. Consequently, we shall count Hammer among the employees who designated the Union as their collective-bargaining representative.

Accordingly, we find that the Union successfully solicited authorization cards from a majority of the Respondent's employees at least as of February 15.

In *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), the Supreme Court approved the use of authorization cards as an indication of employee sentiment, and further approved reliance upon such cards as a basis for a bargaining order where there is "a showing that at one point the union had a majority" and the employer has engaged in unfair labor practices which "have a tendency to undermine majority strength and impede the election processes." 395 U.S. at 614.

In the instant case, Respondent's unfair labor practices began on the day following the Union's initial or-

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14. *Aero Corporation*, 149 NLRB 1283, 1291 (1964).

ganization meeting at the Holiday Inn, i.e., February 5, continued unabated through the election, and had the effect of dissipating the Union's majority status as established by authorization cards. Thus, on the morning of February 6, Supervisor Rhealt approached employee Wambaugh and inquired whether he had a good time at the Holiday Inn the night before. A few days later, Foreman Will interrogated employee Hilmer as to what had occurred at the organizational meeting. There followed a massive campaign by the Respondent, through 11 of its supervisors, including its president and manager of manufacturing, to threaten, cajole and coerce employees to drop their support for the Union. Thus, employees were interrogated as to their union sympathies. Implied threats to close the plant if the Union won the election, a subject which goes to the heart of employees' maintenance of their employment, were made by Manager of Manufacturing Griffiths, who told employee Brandt that Respondent's plant would not be worth much without Respondent, and by Machine Shop Foreman Beland, who told employee Greaser that the Union had done no good in Fitchburg and would do no good here, an obvious reference to Respondent's decision to close its Fitchburg plant to avoid unionization. Other threats were made to employees to end overtime, take away benefits, enforce plant rules, and create more onerous working conditions if the Union won the election. In addition, grievances were solicited from employees and in most instances were promptly remedied. In some instances, promises to remedy grievances were made. In all, there were approximately 41 separate instances of threats, interrogations, solicitations of grievances, promises or granting of benefits, and impressions of surveillance of union activities. This series of mis-

conduct culminated in an election eve speech to all employees by Respondent's president, Ketchum, wherein, through reference to the employees' "unhappy experience" in Fitchburg, as discussed above, he implied threatened to close the plant if the Union won the election. In our view, this pervasive misconduct, directly affecting all of the Respondent's employees, created an atmosphere hostile to the Union and its adherents and was clearly intended to, and did in fact, dissipate the Union's majority status among the employees. In these circumstances, we find that "employee sentiment, once expressed through cards, would, on balance, be better protected by a bargaining order." *N.L.R.B.* v. *Gissel Packing Co., supra* at 614-615.

The record establishes that the Union demanded recognition from Respondent in a letter dated February 12 and that Respondent rejected the Union's demand in a letter dated February 14. Although as of those dates the Union did not enjoy majority status, the Union's written request for recognition stated that its demand should be considered as "continuing," and further stated that it was ready at Respondent's convenience to discuss its majority status and to negotiate a collective-bargaining contract. Furthermore, in rejecting the Union's demand. Respondent urged it to file a petition with the Board, which the Union promptly did on February 21. Meanwhile, the day after recognition was denied and 3 days after its initial demand, the Union achieved majority status. Recently, in a similar situation, the Board, providing for a bargaining order as part of the remedy for an employer's unfair labor practices, found that respondent refused to bargain with the union as of the date the latter obtained a majority, which, like here

was after the initial demand was made and the unfair labor practices began.[15] We know of no reason why we should not apply that holding in the instant matter. Accordingly, we find Respondent unlawfully refused to recognize and bargain with the Union as of February 15.

In addition, in light of all the findings above, we find that Respondent violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union, which represented a majority of Respondent's employees and had requested recognition on behalf of those employees. Thus, all of the elements necessary to prove a violation of Section 8(a)(5) were fully litigated and proved at the hearing. In evidence are the Union's demand letter of February 12, Respondent's February 14 letter declining recognition, the Union's petition of February 21, and authorization cards signed by a majority of the Respondent's employees in the stipulated appropriate unit. Accordingly, we find that the record supports and compels a finding that Respondent violated Section 8(a)(5) of the Act by refusing, on and after February 15, the day on which the Union achieved majority status, to recognize and bargain with the Union as the representative of Respondent's employees.[16]

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15. See *Schwab Foods, Inc. d/b/a Scott's IGA Foodliner,* 223 NLRB 394 (1976).

16. *Schwab Foods, Inc. d/b/a Scott's IGA Foodliner, supra.* We have already found that the Administrative Law Judge erred in not allowing the General Counsel to amend the complaint to allege such a violation, and that no prejudice lies in our reversal of that ruling.

Appendix E.

CONCLUSIONS OF LAW

1. Hedstrom Company, a subsidiary of Brown Group, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Association of Machinists and Aerospace Workers, District No. 98, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating employees about their union activities, membership, and desires; by threatening employees with various reprisals if they selected the Union as their collective-bargaining representative, including threatening to close the Bedford, Pennsylvania, plant; by promising employees various benefits if they refrained from selecting the Union as their collective-bargaining representative; by granting employees various benefits if they refrained from selecting the Union as their collective-bargaining representative; by soliciting grievances from employees in order to deter them from selecting the Union as their collective-bargaining representative; and by creating the impression of surveillance of employees' union activities, Respondent has violated Section 8(a)(1) of the Act.

4. All production and maintenance employees, including group leaders, at the Bedford, Pennsylvania, plant of Hedstrom Company; excluding office clerical employees and guards, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. At all times material herein, since at least February 15, 1974, the Union has been the exclusive collec-

tive-bargaining representative of the employees in the above-described unit within the meaning of Section 9(a) of the Act.

6. By refusing, since February 15, 1974, and at all times thereafter, to recognize and bargain with the Union as the exclusive representative of its employees in the appropriate unit set out above, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. Allegations in the complaint that Respondent has violated Section 8(a)(1) of the Act at times and/or in ways not specifically found herein have not been sustained.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Hedstrom Company, a subsidiary of Brown Group, Inc., Bedford, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following paragraphs for paragraph 1(g) of the recommended Order:

"(g) Granting employees benefits if they refrain from selecting a collective-bargaining representative.

"(h) Refusing to bargain collectively with International Association of Machinists and Aerospace Workers, District No. 98, AFL-CIO, as the exclusive bargaining representative of the employees in the following unit:

> "All production and maintenance employees, including group leaders, at the Bedford, Pennsylvania, plant of Hedstrom Company; excluding office clerical employees and guards, professional employees, and supervisors as defined in the Act.

"(i) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act."

2. Insert the following as paragraph 2(a) and reletter the remaining paragraphs accordingly:

"(a) Upon request, recognize and bargain with International Association of Machinists and Aerospace Workers, District No. 98, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the bargaining unit described above with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement."

3. Substitute the attached notice for that of the Administrative Law Judge.

Appendix E.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Act gives all employees these rights:

To engage in self-organization

To form, join, or help unions

To bargain collectively through a representative of their own choosing

To act together for collective bargaining or other aid or protection

To refrain from any or all of these things.

WE WILL NOT threaten to close this plant if you select International Association of Machinists and Aerospace Workers, District No. 98, AFL-CIO, hereinafter District No. 98, or any other labor organization, as your collective-bargaining representative. We have no present intention of closing this plant for any reason. We have no intention of closing this plant at any time for any reason which is exhibited by law.

WE WILL NOT threaten you with any other reprisals if you select District No. 98, or any other labor organization, as your collective-bargaining representative.

WE WILL NOT promise you benefits if you refrain from selecting District No. 98, or any other

labor organization, as your collective-bargaining representative.

WE WILL NOT grant you benefits if you refrain from selecting District No. 98, or any other labor organization, as your collective-bargaining representative.

WE WILL NOT solicit grievances from you in order to deter you from selecting District No. 98, or any other labor organization, as your collective-bargaining representative.

WE WILL NOT interrogate you about your union activities, membership, and desires.

WE WILL NOT create an impression that we have your union activities under surveillance.

WE WILL NOT, in any other manner, interfere with you or attempt to restrain or coerce you in the exercise of the above rights.

WE WILL NOT refuse to bargain collectively with District No. 98 as the exclusive representative of our employees in the unit described below.

WE WILL, upon request, bargain collectively with the District No. 98 with respect to wages, hours, and other terms and conditions of employment of the employees in the following appropriate unit:

> All production and maintenance employees, including group leaders, at the Bedford, Pennsylvania, plant of Hedstrom Company; excluding office clerical employees and guards, professional employees, and supervisors as defined in the Act.

All our employees are free, if they choose, to join District No. 98, or any other labor organization.

HEDSTROM COMPANY, A SUBSIDIARY OF BROWN GROUP, INC.

DECISION

STATEMENT OF THE CASE

BENJAMIN K. BLACKBURN, Administrative Law Judge: The petition in Case 6-RC-6762 was filed on February 21, 1974.[1] A Stipulation for Certification Upon Consent Election was approved by the Regional Director on March 8.[2] The election was held on March 28. In a unit of approximately 245 eligible voters, 113 cast votes for District 98 and 125 cast votes against. There were three void ballots and no challenged ballots. District 98 filed timely objections. The Regional Director issued an Order Directing Hearing on Objections on July 8.

The charge in Case 6-CA-7619 was filed on July 12 and amended on December 2 and at the hearing. The complaint was issued on December 11. On April 11, 1975, the Regional Director withdrew the order he had issued in Case 6-RC-6762 on July 8 and substituted for it a Report on Objections, Order Directing Hearing and Notice of Hearing. At the same time he issued an order consolidating Case 6-RC-6762 with Case 6-CA-7619 for hearing. A formal prehearing conference was held in

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1. Dates are 1974 unless otherwise indicated.

2. The United Steelworkers of America was also a party to this stipulation. However, it withdrew sometime prior to March 19, and its name did not appear on the ballot.

Bedford, Pennsylvania, on May 12, 1975. The hearing was held on August 11, 12, 13, 14, 15, 18, 19, 20, and 21, 1975. The issues litigated were whether, on or about March 4, District 98 represented a majority of Respondent's employees in the unit in which the election was held on March 28 and whether Respondent committed violations of Section 8(a)(1) of the National Labor Relations Act, as amended, sufficiently serious to require a bargaining order as remedy under the principles laid down by the Supreme Court in *N.L.R.B.* v. *Gissel Packing Co., Inc.,* 395 U.S. 575 (1969), As to the former, I ruled at the hearing, for reasons stated in the record, that the General Counsel had failed to prove sufficient valid authorization cards to establish District 98's status as the collective-bargaining representative of a majority of the employees in the unit. (The General Counsel produced 132 authorization cards in a unit of 249 employees. Nine cards were rejected.) As to the latter, for the reasons set forth below, I find that, while Respondent committed some of the violations alleged in the complaint, an order to bargain would not be required to remedy them in any event.

Upon the entire record,[3] including my observation of the demeanor of the witnesses, and after due consideration of briefs, I make the following:

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3. Motions to correct the transcript filed by both the General Counsel and Respondent are hereby granted. The General Counsel's renewed motion to amend the complaint to allege violation of Sec. 8(a)(5), predicated on *Trading Port, Inc.,* 219 NLRB 298 (1975), is hereby denied. The complaint issued after *Steel-Fab, Inc.,* 212 NLRB 363 (1974). *Trading Port* issued in the hiatus between prehearing conference and hearing. I do not read *Trading Port* as requiring or authorizing a specific 8(a)(5) amendment or finding under these circumstances.

Appendix E.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation, is engaged at Bedford, Pennsylvania, in the manufacture of juvenile furniture and toys. During the year just prior to issuance of the complaint, it received goods and materials valued in excess of $50,000 which were shipped directly to it by suppliers located outside the Commonwealth of Pennsylvania.

II. THE UNFAIR LABOR PRACTICES

A. *Background*

There are four Hedstrom plants. The one involved in this proceeding moved from Fitchburg, Massachusetts, to Bedford, Pennsylvania, in 1966, along with Hedstrom Company corporate headquarters. In Massachusetts the employees were represented by the United Furniture Workers of America, AFL-CIO. Relations between that union and management were not smooth. There was, for example, a 13-week strike at a time not precisely revealed in the record but occurring, I gather, not too long before the move to Pennsylvania. In any event, labor troubles growing out of the relationship with the union in Fitchburg were among the reasons the plant moved.

Hedstrom Company is a closely held family corporation. It was acquired by Brown Group in 1973 by an exchange of stock. As president, Oscar Hedstrom ran Hedstrom Company while the plant was located in

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See *Ann Lee Sportwear, Inc.*, 220 NLRB No. 153 at fn. 6 (1975).

Fitchburg, moved to Bedford in 1966, and continued as president after the acquisition. He stepped down on June 15, 1973, when E. Lee (Jack) Ketcham replaced him. (The record does not reveal what, if any, role Oscar Hedstrom has played in the management of Hedstrom Company since that date.) William Griffiths, who has the title of manager of manufacturing, is the top official in the plant on a daily basis, as distinguished from Ketcham's wider ranging duties. He reports directly to Ketcham. He is married to Oscar Hedstrom's niece. His wife is among the beneficiaries of the family trust which owns a large portion of Hedstrom Company.

The Bedford plant has been nonunion since it opened. Two efforts to organize it prior to the one which gave rise to this proceeding resulted in Board elections. One did not. An election was held in Case 6-RC-4628 on April 2, 1968. There were two unions on the ballot. The Furniture Workers International union received one vote. Local 453 of the International Brotherhood of Teamsters, Chauffeurs and Helpers of America received 54. There was 119 ballots marked in the "Neither" box. An election was held in Case 6-RC-5576 on October 15, 1970. International Union of District 50, Allied and Technical Workers of the United States and Canada, failed to receive a majority. (The record does not reveal the precise vote by which the union lost this election.) Objections were filed in the former case but not in the latter. On the occasion when objections were filed, the Teamsters failed to file exceptions to the Regional Director's report recommending overruling of its objections.

The campaign which culminated in the election in Case 6-RC-6762 on March 28 began in late January when Jesse Young, an IAM grand lodge representative with

jurisdiction in the Bedford area, first contacted some of Respondent's employees. In a more formal sense, it was kicked off by a meeting held at the local Holiday Inn on February 5 at which Young met with 35 employees.[4] The campaign was common knowledge from that point on. All of the 8(a)(1) allegations involved in this proceeding grow out of words spoken by Respondent's managers and supervisors thereafter as part of Respondent's countercampaign.

B. *E. Lee Ketcham*

1. Speech

a. *Credibility*

The culmination of Respondent's campaign was a speech Ketcham delivered to all employees on the eve of the election. He spoke to the second shift around 10 p.m. on March 26. He spoke to the first shift on the morning of March 27. (The polls opened at 3 p.m. on March 28. Respondent selected the times for Ketcham's presentations with the Board's *Peerless Plywood* rule in mind.)[5] Ketcham testified that, with the exception of some introductory pleasantries which are not otherwise relevant, he did not deviate from a prepared script. Several of General Counsel's witnesses testified that, in alluding to the plant's Fitchburg history, he used the phrase "bitter experience" and said specifically "you have their [i.e., the employees in Fitchburg] jobs now." Neither "bitter" nor the statement about "their jobs" appears in

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4. I do not credit the testimony of Clayton Miller as to what Young said on this occasion.

5. *Peerless Plywood Company,* 107 NLRB 427 (1953). No speeches to massed assemblies of employees by either side in the 24-hour period before the polls open.

the script which Ketcham used. In other respects there is no disagreement as to the content and thrust of the speech.

As to precisely what Ketcham said, I credit Ketcham over the General Counsel's witnesses and find that he did not, in fact, deviate from his script. It would have been stupid of Ketcham to depart from a speech approved in advance by Respondent's labor relations counsel in the context of Respondent's recent experiences with Board election procedures. Ketcham is not a stupid man. It does not follow, however, that I am discrediting any of General Counsel's witnesses generally because of this discrepancy. As is more fully set out in the analysis below of what Ketcham did say, the General Counsel's witnesses were relating, in their own words, the message which they got from the words actually spoken.

b. *Facts*

Ketcham began, "Well, here we go again" and proceeded to point out this was the third Board election at the plant in 7½ years. He complimented the employees on the manner in which "all concerned" had conducted themselves. He stressed the secrecy of the ballot. He then said, "I am having this meeting with you today to sum up the Company's position and state our case." He alluded to himself as "the new kid on the block" who "must defend himself for a while" as the springboard for comments on his personal contacts with the employees, the subject of "some personal comments" by the Union "I would like to correct." He next compared the campaign which was drawing to a close to a political campaign between the "ins" and "outs." He pointed out that the "ins" could run on their records while the "outs" could only make promises. He then said:

With that general background, I would like to do two things today:

First, to review the Hedstrom record;

Second, to address myself to the question, "Why doesn't Hedstrom want a union in Bedford?"

Ketcham accomplished the first half of his mission by discussing at some length the employees' present fringe benefits, wages, and working conditions and the Company's plans for future growth in which the employees would share. He accomplished the second half by saying:

Why doesn't Hedstrom want a union in Bedford?

First—We do not think one is needed or necessary.

Second—We prefer to deal with you directly as individuals—not to take advantage of you, but to treat you with dignity as individuals.

Third—A union means a contract. If we sign a contract in any phase of our business, we honor it. Contracts can create rigidity that, in turn, pushes companies to operate "by the numbers." But, we prefer to work with you as individuals.

No contract can cover all of those *individual* human situations that come up daily. We don't want to be an impersonal management restricted to operating by "the book".

Fourth—The I.A.M. said it—you take your complaints to your union steward. *He* represents you. Can anyone do a better job for you than your-

self? We prefer to deal with you directly—not to take advantage of you, for heaven's sakes, but because we respect and believe in the dignity of the individual and we will always treat you as such. Are the people pushing this thing the people you want to represent you in the years ahead?

Fifth—This Company has already had experience with a union—in Fitchburg. It was an unhappy experience for us, and we honestly think it was for our hourly employees also. Unions aren't always what they are cracked up to be.

Sixth—We don't think men and women should have to pay dues for the right to obtain decent wages, benefits, hours and working conditions—and for security.

This sums up in a nutshell our response to this question. It also concludes my comments relative to the Company's position, just as frankly and honestly as I can make it.

Ketcham then concluded his remarks with a summary of "the question" from Respondent's point of view ("do you wish to retain your individual freedom to speak for yourself, or do you wish to surrender this right and have a third party as your exclusive bargaining representative?"), a request for a "No" vote "after careful consideration of all the facts," and a Red Skelton "God Bless."

c. *Analysis and Conclusions*

Three of five objections filed by the Union in Case 6-RC-6762 have been referred to me. One of them is based on this speech. The other two are based on a newspaper

article which appeared in the Bedford Gazette on the morning of election day, March 18. Since the newspaper article is not alleged in the complaint as a violation of Section 8(a)(1) of the Act, I set forth the pertinent parts of it in detail and weigh its significance in the appropriate place below. It is, nonetheless, relevant to the issue under consideration here—and, for that matter, the issue underlying all the statements made by Respondent's people which the General Counsel finds tainted, i.e., what was the point Respondent was trying to make to its employees in order to persuade them to vote against the Union—for it establishes beyond doubt the single most important fact in this proceeding: The whole community in which the plant was located was aware that it ran away from the Furniture Workers union when it moved from Fitchburg to Bedford.

In the fifth of his six reasons why Respondent did not want a union in Bedford, Ketcham said, "This Company has already had experience with a union—in Fitchburg. It was an unhappy experience for us, and we honestly think it was for our hourly employees also. Unions aren't always what they are cracked up to be." When he alluded to what had happened in Fitchburg, Ketcham knew and every employee in the room (with the possible exception of those so new or so dense that they had not yet heard or understood the story of how the plant came to be in Bedford) knew what he was talking about. The dispute between Ketcham and the General Counsel's witnesses as to just which adjective he prefaced the word "experience" with is immaterial. An "unhappy" experience is as close to a "bitter" experience as Tweedledum is to Tweedledee. When, however, Ketcham drove his point home by saying in the next breath "we honestly

believe [the experience] was [unhappy] for our hourly employees also," he and every employee in the room knew the experience Fitchburg employees had undergone. They lost their jobs when the plant moved. It is no wonder that, by the time of the hearing, the employees were remembering a specific statement by Ketcham that they now had the jobs formerly held by Fitchburg employees because of the latter's unhappy experience with a union, even though those were not the precise words Ketcham used. That was the message Ketcham intended to convey by the words he did use. "Unhappy experience" became "bitter experience" in the employees' memories because that was the phrase placed in the mouth of an unidentified manager of the plant by the Bedford Gazette. An allusion to the loss of jobs in Fitchburg became a specific statement by Ketcham because they got the message Ketcham intended to send them. I find, therefore, that when Ketcham stated the fifth of Respondent's six reasons for not wanting a union in Bedford, Respondent impliedly threatened to close the plant in the event its employees selected the Union as their collective-bargaining representative, thereby violating Section 8(a)(1) of the Act.

2. Other

Two other incidents during which the General Counsel contends Ketcham spoke words violative of the Act present credibility problems not unlike the speech. Both occurred during social events. The accounts of General Counsel's witnesses on the one hand and Ketcham's on the other are not diametrically opposed. All agree as to the circumstances under which the conversations took place and the general tone of what was said. The con-

flict lies in the fact that, while Ketcham is in agreement about the subjects under discussion, his account, in effect, denies he spoke the precise words which the General Counsel's witnesses put into his mouth. In the Suhrie incident, for example, Ketcham testified that Suhrie, not he, brought up the subject of the Union. In both incidents I have credited the General Counsel's witnesses over Ketcham to find he did, in fact, speak the words the General Counsel claims he spoke.

A social organization made up of Respondent's employees holds periodic affairs to which management as well as employees are invited. One such, a dinner-dance, was held on the night of Saturday, March 16, at the Elks Club in Bedford. Late in the evening, when the partying was well advanced, Ketcham got into a man-to-man conversation at the bar with Norman Anderson, a press operator. James Rush, a spot welder, wandered up for a few moments, put his 2-cents worth in, and wandered away. Part of the conversation was shop. Part was not. At one point, Ketcham asked Anderson what his biggest gripe was. Anderson said he was losing money under the incentive system ever since a new piece of equipment had been installed. Ketcham said he was going to get things like that straightened out as soon as the election was over. At another point, during a discussion of Anderson's life and hard times, Ketcham pointed out that he was an abrasive sort who nonetheless was a success in his job at the plant. He assured Anderson that he was judged on the basis of his work only and urged him to have more confidence in himself. In this context, while telling Anderson what an irritating fellow he could be, Ketcham said that, if he had been president of the Company the first three times union was brought up, he would have fired Anderson's "fucking ass."

A similar party was held in December as part of the Christmas festivities. (This is the only allegation of the complaint which does not fall within the period when the Union was seeking to organize Respondent's employees. In his brief, the General Counsel claims a special significance for it in that "Even after the election, Respondent President Ketcham unlawfully interrogated employee Suhrie, thus highlighting the continuing need for a remedial bargaining Order.") During it, Ketcham chatted with Leo Suhrie, a bicycle assembler who happened to be laid off at the time. Ketcham inquired what Suhrie was doing with himself. This led to a discussion of hunting, an interest which both men share. During their chat, Ketcham asked Suhrie in passing what he thought about the Union. Suhrie said it had advantages and disadvantages. The conversation turned to another subject.

I find nothing coercive in either of these incidents, Ketcham did not ask Anderson about his gripes in order to solicit his grievances. The incentive system came up as two men talked shop. They had shed, at least for a few hours, their roles as boss and worker. They were communicating with each other as equals under social, not plant, conditions. Ketcham did not warn Anderson that he was in danger of being fired because of his prounion stance in the current campaign. On the contrary, Ketcham was making the precise point that, while Anderson's abrasive personality might have gotten him into trouble during earlier union drives, he had nothing to worry about this time with Ketcham in charge of Respondent. (Cf. *Rust Craft Broadcasting Company, a wholly owned subsidiary of Rust Craft Greeting Cards, Inc.*, 214 NLRB 59 (1974). The question which Ketcham

put to Suhrie occurred under precisely the same circumstances as the Ketcham-Anderson conversation. It was idly asked and idly answered. I find, therefore, Respondent did not violate Section 8(a)(1) of the Act on either of these occasions.

C. *William Griffiths*

1. Credibility and analysis/conclusions

The General Counsel has laid the greatest number of violations by far at the door of William Griffiths, Respondent's manager of manufacturing. Twenty-two employees testified about conversations with Griffiths during the Union's organizing campaign. Griffiths was asked about each of them. Some he corroborated in their essential details. Some he recalled but in terms which threw a totally different light on what occurred. Some he did not remember at all. Most fall into the second category. One of the simpler examples will suffice, I hope to clarify the nature of the credibility conflicts posed. Kevin Miller testified he had a conversation with Griffiths in March, "a few weeks before the election," thus:

> I was gathering material for my job and he came up and we started talking about golf and then he asked me how I saw the Union and I said, "Well, it didn't matter to me which way it went. You know if the Union got in that I was more or less against the Union coming in" and then that was about all and I went back to my job.

When Griffiths was asked if he had heard what Miller had said, his testimony went like this:

> A. Yes I did hear it.

Q. What are the facts?

A. The facts are that I probably talked to Kevin on sports probably more than anybody in the plant. I followed his career through high school. He happens to date a gal that is my oldest daughter's best friend, and as a result, we have a lot of common ground. I was talking to him about sports and golf, and Kevin was a fairly new employee. I pointed out to him what I thought were the advantages of working at Hedstrom and asked him to support me in the coming election.

Q. Did you ask him how he felt about the union?

A. I did not.

Q. Mr. Miller testified that he said he didn't care, that he was more or less against the union?

A. Yes, I always thought he was against the union.

Q. I didn't ask you that, I asked you did he say that?

A. I don't recall him saying that, but I do remember that we had the conversation, and I asked him to support management in the coming election.

The crucial difference, of course, between these two versions of a conversation which admittedly took place lies in Miller's "and then he asked me" and Griffiths' "I did not [ask him how he felt about the Union]." Did Griffiths coerce Miller by asking him how he felt about the Union at a time and under circumstances where the interrogation could serve no legitimate purpose? Or did

Miller volunteer his views to a friend in the course of a conversation about something totally unrelated to the situation created in the plant by the Union's organizing campaign?

Where, after a fair reading of the record as a whole, I have been unable to reconcile the testimony of the General Counsel's witnesses with that of Griffiths, I have, generally, credited the former over the latter. In the Miller-Griffiths example, I find, as set forth in the section entitled "Facts," next below, that Griffiths asked, not that Miller volunteered. I do so for a number of reasons.

Respondent conducted an active antiunion campaign. It sought to take full advantage of its constitutional right to present its case to its employees in the strongest possible terms. To that end it distributed to its supervisors a checklist headed "Foremen Do's and Don'ts in Handling an Organizational Drive." Of 12 items under the caption "What You Can Do During an Organizational Drive," 11 begin either "Tell employees'" or "Tell the employees." (The lone exception is "Lay off, discipline and discharge for cause so long as such action follows customary practice and is done without regard to union membership or nonunion membership.") They run the gamut of arguments why employees do not need or should not want a union from "Tell employees of the disadvantages that may result from belonging to a union —such as loss of income because of strikes, requirement to serve on a picket line, expense of dues, fines and assessments" to "Tell employees that no union can make a company agree to anything it does not wish to, or pay any more than it is willing or able to do. All such things are subject to negotiations."

Appendix E.

Griffiths pursues an open-door policy in running the plant. He depends on friendly face-to-face relations with even the lowliest employee, frequently stopping to chat as he goes through the plant. While following his usual practices in this respect, he admittedly tried to do the sorts of things the checklist indicates he could legally do. Time after time, his version of a conversation which does not quite jibe with the version of the General Counsel's witness stresses the fact that, while he tried to get Respondent's views across to the employee, he was meticulous about assuring the employee that he could vote as he pleased without fear of retribution. Unfortunately, like any checklist, the one Respondent used speaks only in broad generalities. Any reader unversed in the nuances of labor law could well miss the subtle distinctions which separate a "Do Tell" from a "Don't Tell." Did Griffiths?

I think he did. My reason, once again, grows out of admitted facts. Respondent's employees were restless to the point of seriously considering unionization because of a number of conditions in the plant. One of the most serious was the effect Respondent's seniority system has on the employees' opportunities to increase their earnings under Respondent's incentive pay system. Ketcham, the president, became aware of this problem in November 1973. He ordered Griffiths to sound out the employees and get their views on what they thought the seniority system should be. In several of the conversations at issue in this proceeding, Griffiths made the point that he was speaking to the employee in order to get his views on seniority pursuant to Ketcham's instructions. Nowhere do Ketcham and Griffiths explain why they waited until after the Union's organizing campaign began to seek

to solve the problem. The only reasonable explanation, I think, is that both were galvanized into action by what they perceived as the Union's direct threat to Respondent. I conclude, therefore, that Griffiths misinterpreted Respondent's list of "Do's" got carried away with his efforts to combat the Union in a lawful manner, and at times stepped over the line which separates Section 8(a)(1) from Section 8(c).

There are three exceptions where I have credited Griffiths over the General Counsel's witness. Alfred Wertz testified he "was put on floor work" and Griffiths came by and asked how he was doing. Wertz said he would rather be in the paint department. Griffiths said he would see what he could do about it. On cross-examination, Wertz was asked whether it was not true that he asked Griffiths for another job because the job he was doing was giving him sore hands. Wertz replied: "I don't remember whether I did or not." He was then asked if it was not a fact that Ketcham had been with Griffiths at the time. Wertz replied: "I don't remember who was with him, if anybody."

I am persuaded by the fact the General Counsel did not recall Wertz in rebuttal to testify Griffiths and Ketcham were testifying about another conversation entirely that all three were talking about the dowel incident, which occurred a couple of weeks before the election. I find, on the credited testimony of Griffiths, corroborated by Ketcham, that this incident grew out of an immediate production problem so that Griffiths' concern for Wertz was not motivated by antiunion considerations and thus can be distinguished from similar incidents where Griffiths unlawfully solicited grievances. What happened on this occasion was that Wertz was recalled

from layoff and put on an operation in which dowels had to be machined in a particularly difficult manner. Ketcham returned from a sales trip and asked how the particular part was being produced. Griffiths told him that, reluctantly, he was having the work done in the plant. Griffiths and Ketcham went to the machine where Wertz was working. They observed that holding the dowels was blistering Wertz' hands. They expressed their concern. Wertz said he would rather be back on the job he held in the paint department before he was laid off. There was discussion of gloves. There was also discussion of the fact the operation might be only temporary, provided Respondent could find a supplier of dowels already machined. In this context, Griffiths said he would do what he could to relieve Wertz' situation.

My reason for rejecting the testimony of Kenneth Wambaugh as the basis for finding an 8(a)(1) violation by Griffiths is somewhat different. This one, I am convinced, did arise in the context of Griffiths' reaction to union activity in the plant. His reaction, however, did not exceed the permissible bounds of managerial response to the situation which arose. Wambaugh testified, somewhat vaguely, that on the morning of March 27

> [Griffiths] came out and he walked up to where I was working there and he asked me what was wrong and then he discussed piece rates and that was the extent of the conversation.

On cross-examination, he finally admitted his conversation with Griffiths on the day before the election grew out of some horseplay in the men's room in which a prounion employee had made him apprehensive. Wambaugh insisted, nonetheless, that Griffiths had "discussed piece rates" with him at this time. Griffiths' version was

totally different. I credit Griffiths over Wambaugh. The key to this conflict lies in Wambaugh's "he asked me what was wrong." It is obvious, from that, that Griffiths did seek out Wambaugh, as he claimed, because he had received a report from Wambaugh's foreman that Wambaugh was asking for the next day off because he was afraid to vote in the election. Griffiths told Wambaugh Respondent would not tolerate intimidation of its employees by anybody, assured him he had nothing to fear, and urged him to work and vote any way he pleased next day. Griffiths did not, on this occasion, solicit Wambaugh's grievance in order to undermine the Union's organizing campaign.

My reason for crediting Griffiths over Jeff Musselman, a forklift operator, is set forth in the section below devoted to the conversations in which Robert Howsare is alleged to have committed 8(a)(1) violations.

In the section which follows, I detail those conversations in which Griffiths did step over the line in order to combat the Union. Implicit as to each is a finding as to Griffiths' motive.[6] When he asked employees what they thought about the Union, his purpose was not to ascertain, under proper safeguards, whether the Union had the majority it claimed. When he asked employees about their gripes and, in some instances, either promised future or granted immediate relief, his purpose was not merely to run the plant in a more efficient manner.

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6. Findings of motive are not essential to findings of violation, for the test of Sec. 8(a)(1) is whether words spoken, objectively considered, tend to interfere with, restrain, or coerce employees in the exercise of their statutory rights. That Griffiths' motive was, in fact, to interfere, restrain, and coerce only makes the tendency more obvious.

It was to demonstrate to the employees that they did not need the Union as their representative in order to improve their working conditions. My finding that this was, in fact, his motive on these occasions is based, essentially, on a point already discussed in weighing Griffiths' overall credibility. The seniority problem arose before the Union appeared on the scene. Ketcham and Griffiths only got around to doing something about it after.

On the basis of the findings of fact which follow, I find Respondent, in the person of William Griffiths, violated Section 8(a)(1) of the Act by interrogating employees about their union activities, membership, and desires; by soliciting their grievances, and promising and granting them improvements in their working conditions; and by threatening to close the plant in order to deter them from selecting the Union as their collective-bargaining representative.

2. Facts

In February, sometime before the petition was filed in Case 6-RC-6762 on February 21, Griffiths stopped David Mock, a spot welder, as he was coming out of the men's room. Griffiths asked Mock what he thought the gripe was in the plant. Mock said the employees were upset about the seniority system and about having to sign slips if they did not make the incentive rate. Griffiths said he was going to check with the majority of the employees about what they wanted in the seniority system and try to iron it out. He said the plant was going to do away with the incentive slips.

Sometime around March 1, Griffiths approached James Brant, a wheel hanger, at his work station. He

asked Brant what he thought about the Union. Brant said he had not made up his mind yet. Griffiths said the building would not be worth much without the Company.

Around the same time, Michael Hilmer, a cutter, asked to see Griffiths. Griffiths talked to Hilmer in Griffiths' office. Hilmer told Griffiths he wanted to talk because the union situation in the plant had him scared for his job. He told Griffiths about his personal situation and why that made it imperative he not lose his job. Griffiths said he could understand Hilmer's feeling the way he did, but he did not think Hilmer had too much to worry about. They then turned to a general discussion of the situation in the plant. Griffiths asked Hilmer how the men felt. Hilmer said the situation looked pretty bad. Griffiths asked what the men were concerned about. Hilmer said the inability of some of them to make the incentive rates. Griffiths asked what Hilmer's stepfather, an employee named Donald Clark, though about the Union. (Clark and Hilmer were among the employees who signed authorization cards for the Union at the first open meeting held on February 5.) Hilmer said he did not see enough of Clark to be able to answer. Griffiths asked what Clark would complain about if he had a problem. Hilmer said rates, probably, since Clark was one of the men who could not make them when he was shifted from job to job. Hilmer pointed out how difficult it was for the employees under these circumstances—they could not live under conditions where they did not know from day to day just how much they would be earning. Griffiths said Clark could always come to him by filing a grievance if he had a complaint about the rates. Hilmer said he was not even sure that Clark had a grievance about the rates but, as far as Griffiths'

suggestion about filing one was concerned, he knew from a personal experience it did no good. Griffiths said, "Things have changed since then. If a man files a grievance, it comes across my desk. I take care of it. I've been taking care of it" for a while now. "If there is a grievance and it is a legitimate one, I will take care of it."

Griffiths asked if Hilmer thought Clark could be swayed. Hilmer said his stepfather was a stubborn man, he would not even try to change his mind once he had made it up. Griffiths asked about swaying some of the others. Hilmer said he thought there were some sitting on the fence who might still be persuaded against the Union. Griffiths asked Hilmer to do what he could in that regard. Hilmer said his efforts would not be worth much. "What those men do, they are going to have to do on their own."

Griffiths asked if there were any other problems the men were talking about. Hilmer said he would not beat around the bush, he would just tell Griffiths straight out what was causing concern. Hilmer then told Griffiths about the complaint of an employee named Tom Greaser. (Greaser was unhappy because an employee with less seniority than he was making more money.) Griffiths and Hilmer discussed Greaser at some length.

Around March 1, Larry Ickes, a handlebar riveter at the time, wanted to ask Griffiths why Hilmer had gotten a job Ickes had bid for. Consequently, he asked to see Griffiths and was received in Griffiths' office. Jack Faust, the plant personnel manager, was also present. After Griffiths and Faust had satisfied Ickes' curiosity, Griffiths asked Ickes, apropos the pin Ickes was wearing, why he was for the Union. Ickes said he would rather not discuss it. Griffiths did not press the matter. He did

tell Ickes he had a right to vote either way, how he voted was his personal decision. A few days before the election, Griffiths approached Ickes at his work station. Once again, Ickes was wearing a union button. Griffiths asked him what he thought about the Union. When Ickes did not reply immediately, Griffiths said, "Well, what do you think you are going to gain by the Union?"

Ickes said, "Better wages and better working conditions."

Griffiths said, "I guess I can't change your mind."

One evening in March, Griffiths visited the plant during the second shift. He approached the press where Gary Ickes was working. He asked Ickes what his gripe was. Ickes complained about the incentive rates. He said they were good on some jobs but bad on most. Griffiths said he would check into it, adding that, after he got his new job settled down, he would have more time to devote to the people in the plant.

That same evening, Griffiths approached Thomas Lewis at the press where Lewis was working. Griffiths asked Lewis if he had any complaints. Lewis said that Inda Logue (the payroll manager, about whom more below) was bugging him, get her off his back. He also complained about the seniority system, the lack of anyone to discuss complaints with, low pay, and the need for more safety procedures. Griffiths said the Company was already working on a seniority system and he would like to see more safety, too.

On another occasion, Griffiths summoned Alvie Diehl, a press operator, to his office. Faust was also present. Griffiths said he understood Diehl was unhappy about an employee named Ross Hyde. Diehl said he was.

Griffiths said he had records about the matter he would show to Diehl if Diehl would like to see them. Diehl declined. A discussion of Diehl's unhappiness over Hyde expanded into a discussion of pressroom grievances generally. Griffiths asked what the troubles were. Diehl said there were quite a few of them. Griffiths suggested one was the men's dislike for the incentive system. Griffiths said he, too, was not in favor of making a man exceed 100 percent of the established production for his job before he earned extra pay, but others in management were. A requirement that employees who did not make 100 percent had to state why in writing was another sore point for which Griffiths disclaimed responsibility.

In March, a few weeks before the election, Griffiths approached Gary Figard, a press operator and die setter, at his work station. He asked Figard what he thought about the Union. Figard said he had not made up his mind. Griffiths asked if Figard had been talking about the Union. Figard said he had been doing more listening than talking. Griffiths asked if he had been treated all right. Figard said that, since he had been put on the automatic press, he had been treated more than fairly. Griffiths asked if Figard had any problems. Figard said he had been trying for some time to get a jog button put on the press which would make his job easier and faster, but the maintenance man kept putting him off. Griffiths said he would speak to the maintenance man about it without delay. Figard also said he would prefer not to have his rate of pay change when, on occasion, he was shifted to another job for the Company's convenience. Griffiths said he would see about putting Figard on straight pay. The next day Figard's foreman told him he was on straight pay. Figard remained in that

status until November when, as the result of complaints from other employees, he reverted to his old pay status. Within 3 days of his conversation with Griffiths, a jog button was placed on Figard's press.

On another occasion in this same period, Griffiths approached Kevin Miller where he was gathering material for his job and struck up a conversation about golf. Griffiths asked Miller how he saw the Union. Miller said, "Well, it doesn't matter to me which way it goes. You know if the Union gets in that I am more or less against the Union coming in." Griffiths asked Miller to support management in the upcoming election.

On still another occasion, Edward Karns, a service boy for tricycle packers at the time, was picking up cartons when Griffiths approached him. Griffiths asked Karns what he thought of the Union. Karns said he thought it would be a good idea and maybe the employees would get better jobs out of it. Griffiths looked at Karns, turned around, and walked away.

On still another occasion, Griffiths approached John Koontz, a forklift operator, as he was working and asked him if he had any problems. Koontz complained that being required to move wheels from the wheel department to the assembly department took him away from his regular work in another area. Since, as a material handler, he was under a group incentive plan, working for two bosses caused him concern about his opportunity for earning extra money. He asked Griffiths to check on why he had to move all the wheels. Griffiths said he would. Koontz also asked Griffiths to explain the incentive plan. A day or two later Griffiths brought some papers to Koontz and explained how his incentive pay was computed.

On still another occasion, Griffiths called Raymond Horner aside as Horner was walking from the timeclock to his work station. Griffiths asked Horner what he would like to see in the plant. Horner said, "I'd like to see a little bit of sick leave."

Richard Mortimer, a packer, was off sick from December 1973 until March. Just before he went on leave Griffiths approved holiday pay for him which, through a mixup, he never received. When he came back to work about 2 weeks before the election, he asked Griffiths to check into the matter for him. Later that day Griffiths told Mortimer he would be getting his money. He also inquired about Mortimer's health. They then talked about production. Finally, Griffiths asked Mortimer what he thought about "it." Mortimer, who was wearing an IAM button, took this as an inquiry about the Union. Mortimer said he thought it had about an equal chance of getting in. After a brief pause, Griffiths said, "I'll see you," and walked away.

On March 18, James Rush, a welder, happened to be working at a press because there was no welding work to be done. Griffiths approached him and asked what were his problems with the Company and what he thought should be changed. Rush complained about the high production which was required before incentive pay went into effect and about the low hourly rate of pay. Griffiths told Rush to come to him with his problems.

About a week before the election, Griffiths approached Jerry Deremer, a laborer, at his work station as part of his survey on seniority. During the course of their discussion, Griffiths said things would be better next year because Respondent was bringing in more

machines and creating more jobs in Deremer's department. He added that a union would not really help the employees at that time because Respondent would still have to go by seniority as it was already doing.

On another occasion in this same time period, Griffiths sought out Wayne Earnest, leadman in the research and development department, and asked him how he would bet on the outcome of the election. Earnest said he would bet on the Union. Griffiths asked why. Earnest said because of the promises made in the past which were not kept. Griffiths asked Earnest what he was talking about. Earnest told him about a bonus for hourly workers such as servicemen who were not on incentive. Griffiths said that present management could not be blamed for past management's failure to keep its promises. He pointed out that Oscar Hedstrom had had a consultant make a study of the subject and the consultant had failed to come up with a solution. Earnest said that another plant in the area had found a solution. Griffiths said he did not know that. They turned to another employee who they thought might have some information about the other plant. All he could do was confirm Earnest's facts without enlightening Griffiths about how the other plant had solved the problem. Griffiths said, "Well, when things settle down, I'll check with Kennametal to see how they operate it."

On still another occasion, Griffiths stopped by the station where Stephen Imler was assembling wheels. Imler was wearing a union button. Griffiths asked Imler how he thought the election would turn out. Imler said he was not sure because he had not done any of the things like attend union meetings which would give him any feel for the situation. Griffiths asked him if he had

any complaints. Imler said he had one—servicemen were overworked and underpaid. Griffiths said Respondent was working on an incentive plan for servicemen.

On March 26, just before the second shift assembled to hear Ketcham's *Peerless Plywood* speech, Griffiths started a conversation with Eric Felix, an automatic press operator. Griffiths spoke to Felix because he was wearing union buttons all over his hat and shirt. Griffiths asked Felix what he thought about the Union. Felix said he thought it was a good idea, it would make a lot of changes. Griffiths said Felix had not been there long enough to see a lot of changes that had already been made. He asked Felix why he had not stayed at another plant where he was a Teamsters member. Felix said he had left to avoid being laid off for economic reasons. Griffiths asked him how he liked his job. Felix said he liked it but the pay was too low. Griffiths asked him why he did not go on incentive. Felix said he should not have to be on incentive to make a decent living. As Griffiths walked away, he said, "Do us a favor and vote on Thursday."

On March 28, Griffiths approached Larry Winegardner, a conveyor loader in the painting department. Griffiths asked Winegardner how he thought the election would go. Winegardner said, "That depends on the majority."

Griffiths said, "Do you really think we need a union?"

Winegardner said, "That also depends on the majority."

Griffiths said he was responsible for running the plant, he was capable of running it without any outside

help, and if the employees had any problems they were to bring them to him.

D. *Rene Rheault*

Of the lower level supervisors named in the complaint the most active by far in Respondent's antiunion campaign (at least, if the number of witnesses for the General Counsel who testified about conversations with him is any criterion) was Rene Rheault. Rheault has worked for Respondent for 31 years. In Fitchburg he was a press operator. During the middle 50's, he served as a steward for the Furniture Workers union. When he moved with the plant to Bedford in 1966 he was promoted to foreman in the pressroom. With his background, he was well qualified to tell employees about Respondent's "bitter experience" with a union in Fitchburg.

Rheault's testimony posed credibility conflicts similar to but less serious than Griffiths'. Rheault admitted that he "talked to some people and told them that we had good benefits and good working conditions." He even admitted that he talked about Fitchburg. Counsel for Respondent asked him if Randy Whetstone's statement that Rheault "said the union stifled the growth of the company in Massachusetts" was correct. Rheault replied, "Around about those words." Rheault categorically denied the stories of only 2 of the 10 employees who testified about conversations with him. As to another, he admitted an incident occurred but denied he spoke any words at all. Of the other six he was asked about, he either admitted them or, like Griffiths, gave a version which differed in some material respect from that of the General Counsel's witness. (Rheault was not asked about a conversation with Thomas Lewis.) An example of this is Rheault's response to the testimony

of Richard Ickes about a conversation which took place about a month before the election. Ickes said:

> Rene approached me and he said—he asked me an opinion of mine, what I felt about a union coming in the company; and I said that I couldn't really judge because I had never worked under a union and it had some good points and bad points, just like the company had.
>
> He even then said, "Well, if the union gets in, we might have to renegotiate for your benefits, like paid vacation, holidays and health insurance." And I answered nothing after that, and I just continued on my way back to the wheel room.

Rheault admitted "part of that occurred," saying:

> One day Richard was working in my department, and I noticed he was wearing a button, and I asked him, I guess you're for the union. He said he had never belonged to a union before, the union was like a company, it had its goods and its bads, and I explained to him that we had good benefits, and then also I told him that everything that we had would be negotiable, all of the benefits we had.

Here, unlike the Griffiths-Miller conflict set out as an example above, Rheault readily admitted he started the conversation. The conflict lies in the subtle difference between Ickes' version of Rheault's remark about renegotiating for benefits and what Rheault was willing to admit, he said. Ickes' version implies bargaining from scratch, i.e., negotiations would start from a position where employees had no benefits rather than from the benefits they already enjoyed. Rheault's version implies the latter. For the same reasons I credited the General

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Counsel's witnesses, generally, over Griffiths, I have credited them over Rheault in those areas where there is a discrepancy between the two versions. The following findings of fact describe 9 rather than 10 Rheault conversations because, having discredited Jeff Musselman generally, I made no findings of fact as to a conversation he said he had with Rheault some 3 weeks before the election, a conversation which Rheault testified never took place:

On February 6, the day after the Union held its first public meeting, Rheault asked Kenneth Wambaugh if he had had a good time at the Holiday Inn the might before. Wambaugh went to another meeting a couple of weeks later. The next day he wore a union button in the plant. Rheault asked him what had turned him sour. Around this same time, Rheault had a conversation with Wambaugh in which he told Wambaugh about his experiences in Fitchburg. He explained negotiations in the context of what had happened to him when he was a steward in Fitchburg. He said that sometimes he had had to negotiate a long time at night. He said that, in negotiations, Respondent could renegotiate such existing benefits as insurance and vacations.

In middle or late February, Rheault asked Alfred Wertz what he thought about the Union. Wertz said he did not know. Rheault said he thought Respondent treated everybody fairly and the Union could not do much better. He told Wertz he would get Wertz back into his department on a better job than he had formerly held there if Wertz would promise not to vote for the Union. He said Wertz would be sorry if he voted for the Union.

About a month before the election, Rheault approached Richard Ickes and asked him how he felt about a union coming into the plant. Ickes said he could not really judge because he had never worked under a union, but he thought it had good points and bad points. Rheault said, "Well, if the Union gets in, we might have to renegotiate for your benefits, like paid vacation, holidays and health insurance."

In this same period, Rheault approached Gary Bowser, a laborer, and asked him why he was in favor of the Union. Bowser said he thought the employees would get better benefits and better wages. Rheault said Respondent had a union in Massachusetts and a 13-week[7] strike had gotten employees nothing; all it did was create a hardship, especially on married employees.

About 3 weeks before the election, Rheault stopped by James Rush's work station to see how he was getting along on the job he was doing. Rush brought up the subject of the Union. He said that, when management came out to give him an incentive rate for what he was doing, he was going to put on a union pin and maybe get a better rate. Rheault said he did not blame Rush for pushing the Company to get a better rate but to vote a union in would be a mistake.

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7. Bowser actually testified Rheault said "they had an 18-week strike." However, there is no dispute that a part of Respondent's "bitter experience" with a union in Fitchburg was a 13-week strike. Another witness testified Rheault told him about the 13-week strike. I attach no significance to this slight inaccuracy in Bowser's recall. Rheault admitted he told Bowser about the strike.

In this same time period, Rheault walked into the pressroom foremen's office near the end of a conversation between Thomas Lewis and William Valiton. (It is covered in the section below devoted to an allegation involving Valiton.) Rheault said, "I want to give you a for-instance of what a union can do for you." He told Lewis about negotiations which had taken place in Fitchburg at a time when he was a union steward. He said that a big union official dressed in fancy clothes and driving a big car had come into the plant and convinced the employees to give up a cost-of-living clause for a larger raise by saying the cost of living was not going to go up. Rheault concluded, "Just look how the cost of living has went up." Lewis said it was not the union's fault entirely because the employees had had a chance to vote on what they wanted.

A couple of weeks before the election, Rheault approached Donald Howsare, a spot welder-press operator, and asked him what he thought of the Union. Howsare said he had no specific idea about it, there were both good and bad points. The conversation then turned to a discussion of a wage increase projected for the spring of 1975.

A week before the election, Rheault asked Thomas Greaser what he thought about the Union. Greaser asked Rheault what he thought. Rheault answered by telling Greaser about the union in Massachusetts, a subject with which Greaser was already familiar. Rheault said the union in Fitchburg was no good. He said that if the Union got into the Bedford plant the employees would probably lose their hospitalization, pension plan, and other benefits, and the company might even cut out overtime. (Employees were receiving

overtime on a regular basis in the period prior to the election.)

On election day, not long before the polls opened, Rheault asked Randy Whetstone if he had any questions. Whetstone asked Rheault about his incentive situation. Machine operators usually are assisted by a serviceman who brings work to them. On this occasion, Whetstone had no serviceman. Consequently, getting his own work reduced his output on the machine and made it difficult, if not impossible for him to exceed 100-percent production, thus earning incentive pay. Rheault told Whetstone to punch out when he went for work and back in when he began operating the machine again so that his incentive pay would not be affected by his lack of a serviceman. Rheault then asked Whetstone what he though about the Union. Whetstone said he was in favor of it because he had no one to represent him; the Company gave him what it wanted and he had no way of getting any more. He also said he did not like being fired on the whim of a foreman. Rheault asked what he meant by that. Whetstone related an incident in the past when a supervisor named Red Jarvala had threatened to fire him and two others. Rheault said Jarvala would not have fired him. Whetstone said, "If he would have said I was fired, I would have walked out. There wouldn't have been nothing to it." Rheault insisted that Jarvala could not have fired Whetstone.

Rheault then asked Whetstone what he thought about strikes. Whetstone said, "Well, there wouldn't be a strike unless the Union voted to strike and we wouldn't vote to strike if the Company would show to us in black

and white that they couldn't afford what we were asking for, whether it be wages, benefits, or whatever."

Rheault said, "What about wildcat strikes? One time up in Massachusetts, there was two men in the rest room who wanted to watch the World Series and they started a wildcat strike that lasted for 13 weeks and the employees didn't gain anything." He said the reason the Company left Massachusetts was that the union was always pushing it and stifling its growth. Whetstone argued that the Union would help the Company by attaining higher wages and benefits which would, in turn, attract a better grade of worker who could turn out a better product.

Rheault also told Whetstone the Company could not afford a wage increase at that time. He said the Union would cost the Company contracts; customers would not order from it if they thought it was having labor problems, they would buy off a more secure company. He also said the Company would not be able to guarantee to its customers what its prices would be. Whetstone took issue with this point, arguing that a contract with the Union would give the Company an exact labor cost to use in its pricing. Rheault countered by pointing out that Respondent was in a very competitive business. He said it had only beat out its competitors on a recent contract for bicycles by 20 cents a bike. He said Respondent was already being outbid on some contracts.

The conversation ended when Rheault asked Whetstone if he knew the Union was going to do him any good and Whetstone replied he did not know but was willing to take a chance. Rheault reminded Whetstone he had a right to vote as he pleased.

I find nothing illegal in Rheault's conversations with Rush and Lewis. Rush, in effect, solicited Rheault's views about the Union, and Rush got in an 8(c) lick for Respondent. Similarly, Rheault walked in on a conversation already in progress and tried to persuade Lewis to Respondent's point of view by telling an innocuous anecdote. However, on the basis of the other conversations, I find Respondent, in the person of Rene Rheault, did commit the following violations of Section 8(a)(1) as alleged in the complaint:

> Interrogation about employees' union activities, membership, and desires.
>
> Threats of various reprisals, including implied threats that it would close the plant if employees selected the Union as their collective-bargaining representative.
>
> Promises of various benefits if employees refrained from selecting the Union as their collective-bargaining representative.
>
> Creation of the impression of surveillance of employees' union activities.

E. *Inda Logue*

Another outspoken supervisor in Respondent's preelection campaign was Inda Logue, the payroll manager. There are no significant credibility conflicts in this area. While her versions are couched in somewhat different terms, Ms. Logue's testimony about these conversations is, in effect, an admission of the statements attributed to her by the General Counsel's witnesses.

Some 2 or 3 weeks before the election, Ms. Logue stopped Thomas Lewis in a hall in the plant. She asked

him if anybody had been bothering him about the Union. He told her no. She said she thought he had gotten a break at the plant and asked him why he did not give Ketcham and Griffiths a chance. She said, "You don't want to be standing out in a picket line half of the winter."

About a week later, Michael Hilmer bumped into Ms. Logue and an employee named Joyce Wilkins in the first aid room. As Hilmer walked in, Ms. Logue was saying she could not understand why the men wanted a union in the plant, there had to be something done about it, it just was not going to do any good. She pointed out various benefits which the employees enjoyed, such as a 10-minute break in the morning and not being penalized for lateness if they clocked in within 2 minutes of their appointed time. She mentioned that the employees had profit sharing and a good insurance program. She said that some men had made nasty remarks about her in the plant. Hilmer said, "You know, maybe if the men weren't hounded, they wouldn't be so nasty to you. Men don't like being ridden any more than anybody else does."

Ms. Logue said, "Yeah, but somebody has got to tell them. They are making a mistake. If they bring a union in here, it's only going to cause trouble and they will be the ones to suffer in the end. They pay for it, no matter how you look at it."

Hilmer said, "But still, they are all grown men. They have to make up their own mind."

Ms. Logue said, "Well, whenever you look at guys like Eugene Moyer, it makes you wonder if they can."

In the week before the election, an employee named Judy Conner suggested to Ms. Logue she talk to Jerry Deremer because other employees had been pressuring him about the Union. Ms. Logue went to where Deremer was working. She asked him how he was doing. She then told him the Company did not need a union, it would hurt more than it helped. She pointed out that he was new in the plant, said she knew that he could vote either way as he pleased, but suggested he give Griffiths a chance to straighten out the problems in the plant without a union. She then asked Deremer if he knew how an employee named Ed Allison felt about the Union. Deremer said he did not. Ms. Logue left Deremer and went to talk to Allison.

In that same week, Ms. Logue also approached James Brant as he was working. She asked him how the situation looked in his area. Brant said, "I hope to hell the Union makes it."

Ms. Logue said, "You know you will go on strike if it does get in?"

Brant said, "No, I don't know that. I thought it took two-thirds of the vote to strike."

I find on the basis of these conversations that Respondent, in the person of Inda Logue, violated Section 8(a)(1) by interrogating and threatening employees.

F. Robert Howsare

Another supervisor about whom several employees testified was an assistant foreman in the pressroom named Robert Howsare. The only conversation as to which there is a serious credibility conflict is one involving Jeff Musselman, the forklift driver. Musselman testified that, in the course of reprimanding him one

evening for careless work, Howsare said, "Just remember, if you get the Union in you won't have a job any way because the Company's going to close up and move out." While readily conceding that he frequently reprimanded Musselman, Howsare denied that he spoke those words. The General Counsel made no effort to rebut Howsare's assertion that Musselman did not transfer into his department from chrome plating until after the election. Principally for that reason, but also because I was impressed by Howsare's complete lack of effort to shade his testimony or justify his conduct when cross-examined by the General Counsel, I credit Howsare over Musselman as to this conversation and, moreover, discredit Musselman generally. I think the runaway shop aspects of this proceeding have caused Musselman's imagination to run away with him in this instance as well as elsewhere.

The principal difference between the General Counsel's four other witnesses and Howsare is the fact that each of the former testified as to separate conversations with Howsare while Howsare remembered only two at each of which two of his accusers were present. Because I found Howsare such a reliable witness, I have credited him over the General Counsel's witnesses in this regard also and, to the extent there is any conflict in the various versions, I have credited him as to what was said. By finding that Gary Ickes was involved in only one rather than two conversations with Howsare, I have not credited Ickes' testimony that Howsare, on another occasion, "said if we got the Union in, that we would lose our profit sharing." Unlike Musselman, however, I have not discredited Ickes generally.

Just at quitting time one day in the preelection period, Howsare and James Rush got into a discussion

about wages. (While the record is not clear, I gather from Rush's "I started talking with [Howsare] there in the aisle" that he struck up a conversation with Howsare.) Gary Ickes walked up while they were talking. Rush said wages would be better when the Union got in. Howsare said he could believe they would be better because Rush would not be spending so much time in the break areas when he should be working, he would be at his machine. Rush said he would take a break any time he wanted to whether he was making 100 percent or not. (This was a reference to Respondent's incentive pay system.)

During a break one evening in this same time period, Howsare chatted with Thomas Lewis and Eric Felix. Felix was wearing a lot of union buttons, causing Howsare to comment, "You sure are all decorated up, aren't you." Felix said yes and they all laughed. Howsare said, "Well, I hate to see the Union get in because I am afraid things will change." Lewis said Howsare could believe there would be some changes.

I find nothing illegal in the latter conversation. However, in the former, Howsare's remark to Rush, overheard by Ickes, that Rush would spend more time at his machine and less in the break area if the Union came in is an implied threat of more onerous working conditions if Respondent's employees selected the Union as their collective-bargaining representative. I find Respondent, in the person of Robert Howsare, violated Section 8(a)(1) in that manner. I further find the General Counsel has failed to prove that Howsare violated Section 8(a)(1) in the other ways alleged in the complaint, *viz,* by threatening employees with plant closure and loss of benefits.

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G. *Albert Diehl*

I credit the General Counsel's witnesses over Albert Diehl, another assistant foreman in the pressroom.

One day during the preelection period Albert Diehl was making an adjustment to the press which Alvie Diehl was operating. Alvie voiced his complaint about Ross Hydes. (Albert relayed this complaint to Griffiths, and Griffiths had Albert send Alvie to him, thus leading to the Griffiths-Alvie Diehl conversation already covered in the section above devoted to allegations involving Griffiths.) In the course of this conversation, Albert said, "I understand you're for the Union."

Alvie said, "What's wrong with that? You was for the union one time."

Albert said, "I'm not now. You know, you will lose your overtime and you'll have to get 50 cents an hour to make up for it. You'll not get that."

Alvie said, "Well you shouldn't have to work 9 hours [an allusion to the regular overtime employees were working at that time]. Eight hours should be a day."

In this same period, Gary Figard ate lunch one day with Albert Diehl and another assistant foreman named Dan Cessena. They chatted about the Union. Diehl asked what would be gained by getting a union. Figard replied, "What have we got to lose. We might even get better wages." Diehl said the employees were not treated as unfairly as they thought, they already had enough benefits. Figard said the benefits were adequate but wages were not up to par, they could get as much on unemployment. Cessena said, "What about union dues?" Figard did not reply.

I find nothing illegal in the latter conversation. However, in the former, I find Respondent, in the person of Albert Diehl, violated Section 8(a)(1) by threatening loss of overtime if Respondent's employees selected the Union as their collective-bargaining representative. The General Counsel has failed to prove that Diehl violated Section 8(a)(1) by "threatening employees with loss of benefits," another allegation of the complaint.

H. *Other Supervisors*

With respect to all the other supervisors named in the complaint, the General Counsel offered testimony as to only one conversation with an employee.

1. Robert Boudreau and James Beland

I credit the testimony of Thomas Greaser over the testimony of Robert Boudreau that the conversation never occurred and the testimony of James Beland that Greaser asked his opinion about the union in Fitchburg.

About a week before the election, Boudreau, research and development supervisor, called Greaser into his office. He told Greaser that, if the Union got in, the employees would probably lose their hospitalization, pension plan, and other benefits. He then asked Greaser what he thought about the Union. Greaser told him it was none of his business and asked if that was all he wanted. Boudreau did not reply. Greaser asked if he could go back to work. Boudreau said yes. Greaser left the office. I find, on the basis of this conversation, that Respondent, in the person of Robert Boudreau, violated Section 8(a)(1) by threatening and interrogating an employee.

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Early in the week in which the election was held, Greaser was in the office of Beland, the machine shop foreman, at breaktime. In the course of a discussion about the Union, Beland brought up Fitchburg. He said the union there had been no good and a union would do the employees no good in Bedford. I find, on the basis of this conversation, that Respondent, in the person of James Beland, violated Section 8(a)(1) by impliedly threatening to close the plant if employees selected the Union as their collective-bargaining representative.

2. Robert Will

On Saturday, February 9, as Michael Hilmer was riding to work in the car of Robert Will, foreman in the cut, stitch, and upholstery department and Hilmer's immediate supervisor, Will said, "I thought you were sick Tuesday [February 5, the day Hilmer attended the first union meeting]."

Hilmer said, "No, I didn't say I was sick. I just said I wasn't feeling too well."

Will said, "Well, you were well enough to go to the Union meeting."

Hilmer said, "I sort of figured you knew about that. Who told you?"

Will said, "Nobody. I just know."

Hilmer said, "Well, Pappy Miller[8] was there. I saw him coming from the office. Somebody told you, and it had to be somebody that was there."

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8. A reference to Clayton Miller, the employee whose testimony about what was said at the meeting of February 5 I find incredible. See fn. 4, above.

Will said, "No, it just makes no difference how I found out. You were there. What were you doing there? You've got no complaints."

Hilmer said, "Nobody said I had any complaints."

Will said, "Well, what do you want a union in for?"

Hilmer said, "Bob, nobody told me I wanted a union and nobody told me I didn't want one. I just went to find out what was going on."

Will said, "Well, I can't understand it. You've got good work, you've got benefits and everything. Why would you want a union?"

Hilmer said, "I'm not going to let you tell me I don't want one, and I'm not going to let anybody else tell me I do want one. The only way I can find out what I do want is to find out what everybody has to say. Until then, I will make up my mind and not until then."

Will said he just could not understand why the men in the plant would want a union. Hilmer said, "As far as I'm concerned, all I want to do is find out what's going on."

I find, on the basis of this conversation, that Respondent, in the person of Robert Will, violated Section 8(a)(1) by creating an impression of surveillance of employees' union activities.

3. Clark Ferguson

Having discredited Jeff Musselman generally, I credit the testimony of Clark Ferguson, foreman of the chrome plating department, that he was certain he never talked to Musselman about the Union because they

worked on different shifts when Musselman was in chrome plating. (Musselman placed the conversation on February 8, when he was assigned to that department.) The General Counsel has failed, therefore, to prove Ferguson interrogated employees.

4. Dale Springs

I credit the testimony of Loren Weyant, a checker in the shipping department, as to the details of his conversation with Dale Spriggs, shipping department foreman, over Spriggs' denial that he did anything other than "make the statement that the Company did have a rough time in Massachusetts because it was my understanding it had approximately a 13 week strike."

One day around March 1, Spriggs came into a boxcar where Weyant was working. Weyant and the loader were discussing the Union as they worked. Spriggs said he wanted to make sure they understood unions. He said the Company had a rough time with a union in Massachusetts which was one reason why it moved the plant to Bedford. He said that, if the Company got mad enough this time, it could end overtime and take away all the things it was not required to give the employees, such as the Christmas bonus, and crack down on such little things as smoking in the restrooms by enforcing its rules. He said he had heard that, when a union comes into a plant, the employer starts out with a clean slate and the employees have to work their way up before they got back such things as Blue Cross and Blue Shield.

I find, on the basis of this conversation, that Respondent, in the person of Dale Spriggs, violated Section 8(a)(1) by threatening employees.

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5. William Valiton

The conflict in the testimony about William Valiton, like Rheault a foreman in the pressroom, concerns when the conversation took place. Thomas Lewis placed it 2 or 3 weeks before the election. Valiton placed it in the summer, long after the election, replying on his recollection that Lewis' complaint about money led him to discuss Lewis' status with Rheault, who took it up with Griffiths, who authorized Lewis' promotion to leadman. Lewis was not asked when, if ever, he was promoted to leadman. Thus, it is not possible to resolve the conflict on that basis. However, Lewis testified Rheault walked in near the end of his conversation with Valiton, and Valiton conceded that discussion did take place in his presence. I have found in the section above devoted to the allegations involving Rheault that Rheault talked to Lewis in terms that can only be interpreted as an effort to persuade him to vote against the Union. Therefore, I credit Lewis over Valiton as to their conversation, especially as to when it took place.

Some 2 or 3 weeks before the election, Lewis went into the foreman's office to check with Valiton about the work he was supposed to do that evening. Valiton asked Lewis how he felt about the Union. Lewis said he did not think it could do the employees any harm, there probably would not be a big pay increase right away but benefits would go up. Valiton asked what had the rest of the guys so riled up. Lewis said the lack of a definite seniority system and a grievance procedure and the fact the employees needed more money.

I find, on the basis of this conversation, that Respondent, in the person of William Valiton, violated Section 8(a)(1) by interrogating an employee.

6. Merle Diehl

I credit the testimony of Merle Diehl, foreman in the paint department, that he told Larry Winegardner the reason he would not be able to help him with his work any more was "the union contract, the foreman is not allowed to participate in the work with the hourly employees." Winegardner's version of this conversation, as to which both witnesses are otherwise in agreement, lacks this explanation. I am persuaded by Diehl's forthright, if mistaken, testimony that all union contracts have that provision in them, "as far as I know."

On the day of the election, Diehl stopped Winegardner in the aisle in the painting department and said he was not going to tell Winegardner how to vote but if the Union got in he would not be able to help Winegardner any more on the conveyor line because, under the union contract, the foreman is not allowed to participate in the work with the hourly employees. Diehl's statement was a prediction of what might reasonably be expected in the event the Union won and was successful in negotiating for what it wanted, not a prediction of an event solely within the discretion of Respondent as judged by objective criteria. There is nothing illegal in it. I find, therefore, the General Counsel has failed to prove Merle Diehl threatened employees with more onerous working conditions.

III. THE OBJECTIONS TO THE ELECTION

The three objections to the election held in Case 6-RC-6762 on March 28 which have been referred to me are set forth in the Regional Director's report of April 11, 1975, thus:

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1. The Employer, along with a local daily newspaper and the "Industrial Development Commission," threatened, intimidated and coerced the employees, thereby destroying the laboratory conditions for a free choice in the election.

2. The Employer, in a captive audience meeting, conveyed the thought that the Employer would move the plant if the Petitioner won the election.

3. The local newspaper contained the same threat as that referred to in Objection 2 above, and contained threats that proposed plant expansion hinged on the outcome of the election.

As to 2, I have already found in the section above devoted to allegations about E. Lee Ketcham, president of Respondent, that he did, indeed, convey "the thought that the Employer would move the plant if the Petitioner won the election" when he read his *Peerless Plywood* speech to assembled employees on the evening of March 26 and the morning of March 27. Objections 1 and 2 refer to a news story which appeared on the front page of the Bedford Gazette on the morning of March 28. It reads, in pertinent part:

Hedstrom Employees To Vote Today On Unionization

By Ned Frear

Hedstrom Co. production and maintenance workers will vote today on whether to join the International Association of Machinists and Aerospace Workers union (IAM).

A total of 246 employees are eligible for the vote. It is the third union vote in Hedstrom's seven years in Bedford.

Company officers declined to be quoted, for fear of being cited for unfair labor practices. IAM representative Jesse Young said, "I never count votes till after the election, but on an educated guess, I'd say it looks favorable for the IAM."

Hedstrom, which was sold to Brown Group Inc., of St. Louis two years ago, has its headquarters in Bedford. Hedstrom's largest production facilities is in Dothan, Ala. The headquarters shift from Fitchburg, Mass., to Bedford, was made to escape what management felt was an untenable union relationship. "A bitter experience," one said. The Hedstroms left Fitchburg—and the union—behind.

* * * * *

The company says it is paying an average hourly rate of about $3.60. Hedstrom recently announced a 22-cent hourly increase, 15 cents going into effect Monday, and the other 7 cents Oct. 1.

Hedstrom has expanded its benefits to what company executives believe is a fairly liberal package. Production workers have a 9-hour shift, with one hour at overtime rates. The company offers a pension and profit-sharing plan, and pays 75 percent of Blue Cross and Blue Shield coverage. Hedstrom has a "good" paid vacation policy, and nine paid holidays per year.

The incentive plan payoff varies with each worker, depending on performance.

* * * * *

The real issue in the election may be the company's expansion plans. Company officials confirm that the parent corporation, Brown Group, has ap-

proved a $1 million addition to the massive plant along Sunnyside Road. That would provide a 60,000 square foot addition for manufacturing and warehouse space.

Hedstrom officers say they have embarked on an aggressive marketing campaign to increase the output at the local plant in the northeast market.

A second shift has been started this year, but the answer, they say, is to expand the building to handle the bigger volume. The project has been "progressing nicely," they say.

Hedstrom President E. Lee (Jack) Ketcham told Bedford Rotary a month ago that "It's Bedford's turn to grow." Ketcham said most of the growth in recent years had been at the Dothan, Ala. plant, which is not unionized.

When—or if—the expansion will be made could hinge on the union situation, but company officials wouldn't say that. One officer said, "We've all been too busy on this election to think about it."

With Bedford County unemployment recently hitting 18 per cent, Hedstrom is hiring. The management says it expects no cutbacks. And the plant expansion could provide 50 new jobs, with a payroll in the neighborhood of $450,000 a year.

The Bedford plant hires around 50 temporary workers during peak seasons.

Local development leaders have been figuratively biting their fingernails each time an election comes up at Hedstrom. One of the factors in a company's decision to move to a rural location like Bedford is often whether or not a union will be involved.

"If we lose this one, we might as well go out of the development business," one man close to the scene said this week. But he and others have steered clear of the Hedstrom situation, again for fear of unfair labor practice charges.

Edward (Ned) Frear, editor of the Gazette and writer of the story, refused to name his management source, relying on a claimed first amendment right. Counsel for Respondent did not adopt my suggestion that his client release Frear from his promise to protect his source in order to develop a complete record. Ketcham testified that he talked to Frear on March 6 and again on either March 24 or 25. He testified that Respondent's controller, one Jerry Lundine, also talked to Frear. He testified that Lundine has merely referred Frear back to him. (Lundine did not testify.) Ketcham admitted that he was the source of the information in the story about the plant's wages and benefits. He denied he was the source of the information about expansion or the inference that a union victory might alter Respondent's plans. In effect, he denied that he was the source of the "bitter experience" quote. I do not believe him, although, in my opinion, the issue posed by the newspaper story does not turn on Frear's source and my resolution of the credibility point is, technically, irrelevant. I disbelieve him here for the same reason I believed his testimony that he read his *Peerless Plywood* speech without material deviation. Ketcham is an intelligent man, well aware of the nuances and subtleties involved in a sophisticated response to the threat of union organization.

Respondent's brief cites three cases in support of its argument that

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> In the present proceeding there is no showing that the Employer either authorized expressly or impliedly, or ratified the publication of the Article in the Bedford Gazette.
>
> Therefore it is submitted objections 1 and 3 in regard to the Employer should be dismissed.

None is apposite for all are unfair labor practice rather than representation cases. Moreover, the argument misses the point.

I gather from the fact he did not allege publication of the story as an unfair labor practice that the General Counsel concedes that agency must be shown before the activities of some person or institution not obviously associated with an employer can be found to be an unfair labor practice and agrees that, here, there is no showing Respondent either authorized or ratified the story. Therefore, whether the Bedford Gazette was acting as an agent of Respondent is not an issue I have to resolve. If it were, I would find agency. In my opinion, the testimony of Frear and Ketcham taken as a whole, coupled with my disbelief as to Ketcham's denials, is sufficient to support such an inference even though there is no direct evidence of a master-servant relationship between Respondent and the Bedford Gazette. Put in simpler terms, there is no smoking gun.

The issue presented here is whether the story destroyed what the Board has so frequently referred to as the laboratory conditions which must not be contaminated if an election is to be deemed valid. The fact that Respondent moved its plant to Bedford to escape a union is common knowledge in Bedford. The message that it might move away from Bedford if a majority

of the employees voted for the Union could hardly be set forth more clearly than it is in this story short of stating it as explicitly as it is in this sentence. When the story is coupled with the same implied threat in Ketcham's speech, violation of the Board's standards is so obvious as to be beyond argument. There is, therefore, merit to all three of Petitioner's objections. My reasons for not recommending an order to bargain as a remedy for Respondent's unfair labor practices are set forth below in the section entitled "The Remedy." Rather, I recommend that the election held in Case 6-RC-6762 on March 28, 1974, be set aside and a second be held.

Upon the foregoing findings of fact, and upon the entire record in this proceeding, I make the following:

CONCLUSIONS OF LAW

1. Hedstrom Company, a subsidiary of Brown Group, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Association of Machinists and Aerospace Workers, District No. 98, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating employees about their union activities, membership, and desires; by threatening employees with various reprisals if they selected the Union as their collective-bargaining representative, including threatening to close the Bedford, Pa., plant; by promising employees various benefits if they refrained from selecting the Union as their collective-bargaining representative; by soliciting grievances from employees in order to deter them from selecting the Union as their

collective-bargaining representative; and by creating the impression of surveillance of employees' union activities, Respondent has violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Allegations in the complaint that Respondent has violated Section 8(a)(1) of the Act at times and/or in ways not specifically found herein have not been sustained.

THE REMEDY

The traditional remedy for 8(a)(1) violations of the sort found in this proceeding is a cease-and-desist order and a notice. That I recommend those in order to effectuate the policies of the Act goes without saying. However, the real issue in this case, as the record of a long and hotly contested hearing indicates, is whether Respondent should be required to recognize and bargain with the Union. I do not recommend an order to bargain.

The General Counsel concedes that this proceeding does not fall into the first of three classes discussed by the Supreme Court in *N.L.R.B.* v. *Gissel Packing Co., Inc.,* 395 U.S. 575 (1969), the one where unfair labor practices are so "outrageous" and "pervasive" that no remedy other than a bargaining order will suffice even in the absence of an 8(a)(5) violation or a bargaining demand. His argument is summarized in this paragraph from his able brief:

> Counsel for the General Counsel submits that a bargaining Order is the proper remedy in the case at bar inasmuch as Respondent engaged in a clear

course of conduct well calculated to undermine the Union's support. Such conduct included a plethora of Section 8(a)(1) violations, which include, *inter alia,* threats of plant closure and other reprisals, promising and granting benefits, and massive interrogation. Counsel for the General Counsel produced 30 witnesses who testified to Section 8(a)(1) conduct; many testified to incidents involving more than one supervisor or more than one type of violative conduct. Those 30 witnesses constituted 12 percent of Respondent's total work force of 249 employees employed during the time the unfair labor practices were committed. Moreover, the impact of Respondent's conduct extended to all employees as a result of Ketcham's speeches in which he threatened plant closure. It is difficult to imagine a case that is more custom-tailored to the application of *N.L.R.B.* v. *Gissel Packing Co.,* 395 U.S. 575, 71 LRRM 2481, than the instant case. In *Gissel,* that respondent committed "serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election," *supra* at 594. No fair election is possible among Respondent's employees in the instant case, for the Union's majority has been dissipated by Respondent's serious unlawful conduct.

As the quote from page 594 recognizes, the issue is whether this is a second-category case, i.e., one in which "the Board can properly take into consideration the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future" to find "that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the

use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order."

Four recent Board decisions which I have relied on in determining whether or not specific conversations detailed above violated the Act are also relevant to the issue of the "extensiveness" of Respondent's unfair labor practices. They are *Hanes Hosiery, Inc.,* 219 NLRB 338 (1975); *Alside Supply Co.,* 219 NLRB 447 (1975); *Mobil Oil Corporation,* 219 NLRB 511 (1975); and *Flint Provision Co.,* 219 NLRB 528 (1975). I cite them not for their specific holdings but for their discussions of broad principles which, taken together, demonstrate the Board's present thinking in the area of Section 8(a)(1). In *Hanes* and *Alside* the Board found 8(a)(1) violations. In *Flint,* no violations were found. In *Mobil,* a "simple response during a casual conversation with a single employee" was found not to be a violation. Almost all of the conversations here were one-on-one. Many can be described as casual. Viewed separately, most of them do not measure up to the coercive level of 8(a)(1) violation. This is especially true of the minor supervisors, that is, everybody below the level of Ketcham, the president, and Griffiths, the top in-plant boss. The acts of Rheault and his peers cannot be viewed in isolation, however, especially in view of the number of violations by Griffiths and the fact everything occurred "against a background of a campaign calculated to intimidate and coerce the employees." *(Flint, supra.)* Since they did not "occur in a vacuum," they meet the Board's long-recognized test that "interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on Respondent's motive, courtesy, or gentleness, or on

whether the coercion succeeded or failed" but on "whether Respondent has engaged in conduct which reasonably tends to interfere with the free exercise of employee rights under the Act." *(Hanes, supra.)*

The unfair labor practices committed by Respondent were extensive in the sense that they were numerous and not isolated. Whether they were extensive in the Supreme Court's sense is a different question, for they must be weighed in terms of their past effect on conditions at the time of the March 28 election. In that regard, the role of the minor supervisors must be distinguished from that of Ketcham and Griffiths. The testimony of Michael Hilmer illustrates this point.

Michael Hilmer is an articulate, intelligent young man. His forthrightness and candor made him unique among the General Counsel's witnesses. My findings of fact as to his conversations with Will and Griffiths are set forth in such detail above while others are relatively sparse not by choice but because Hilmer was the only witness, with the possible exception of Randy Whetstone, who gave enough detail to put flesh on the bare bones of his recital. To the extent that the General Counsel's other witnesses gave any insight into "past effect on election conditions," their testimony weighs against a bargaining order. Generally, they pictured themselves as either ignoring the supervisor's efforts to affect them or giving as good as they got in the conversation. Hilmer's testimony, on the other hand, highlights the point on which this issue turns. Hilmer was obviously not coerced at all when Will revealed that he knew Hilmer had attended the first union meeting. But Hilmer was concerned enough about what was going on in the plant to seek out Griffiths because he feared for his job. There is no allegation of discrimination against any employee

in this complaint. There is nothing to indicate that Hilmer had any reason to be apprehensive because of his role in the campaign or for any other reason. He was concerned that Respondent might close the plant, a concern based on his knowledge of how it came to be in Bedford in the first place. As counsel for the General Counsel aptly remarked during a colloquy in which I expressed surprise that counsel for Respondent was contending the plant had not moved from Fitchburg to get away from a union, this is a runaway shop case about 10 years later. The one theme of Respondent's campaign which might have had such an extensive effect on election conditions that the chance of a fair rerun is slight is Fitchburg. All of the conversations, whether they involved the minor supervisors or Griffiths himself, which did not raise the specter of Fitchburg are trivial by comparison. In and of themselves they do not rise to the level of the *Gissel* standard. Do the implied threat to close the plant in Ketcham's election eve speech and the conversations specifically about Fitchburg in which changes were rung on the same theme boost this proceeding into the Supreme Court's second category? I think not.

The portion of the General Counsel's brief which I have quoted is the first paragraph of a subsection of his argument entitled "A Bargaining Order Should Issue." The remainder of the subsection is devoted to the cases he relies on. None is dispositive. All but one[9] in-

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9. The exception, *Scoler's Incorporated,* 192 NLRB 248 (1971), involved a small closely knit unit. The rationale for granting a bargaining order—"The repeated threats to punish union adherence and reward union opponents and the coercive interrogation were sufficiently widespread in this small, closely knit unit to make a fair election impossible"—does not apply here.

volve either violations of Section 8(a)(3) of the Act or a grant of a wage increase. The General Counsel is correct that "[t]here is no requirement that any employer must violate other sections of the Act [than Section 8(a)(1)] in order for the Board to impose a bargaining order." However, the *Gissel* principle is not to be applied mechanistically. Here, the 8(a)(1) violations are essentially limited to words spoken with no extensive tangible benefit such as a general wage increase to bribe employees to drop their union activities. Whatever section or sections of the Act Respondent has violated, the proper remedy can only be found by applying the Supreme Court's and the Board's rationale to this proceeding in a nonmechanistic manner.

Two recent Board decisions are dispositive. Neither is on all fours with this proceeding. In *Ludwig Fish & Produce, Inc.*, 220 NLRB 1086 (1975), the Board reversed an Administrative Law Judge who "recommended that a bargaining order is not 'necessary' because the Union made no demand for bargaining and also because the coercive effects of the Respondent's unfair labor practices could be effectively eliminated if and when Girardot and Pennington are rightfully restored to their former jobs with backpay. We disagree and find that a bargaining order is necessary." The Board said:

> There is nothing in *Gissel* which conditions the bargaining order remedy upon a demand for bargaining. Rather, as the Supreme Court stated, the test is whether we may reasonably conclude that Respondent's unfair labor practices have rendered "a fair and reliable election" impossible. In *Gissel*, the Court upheld the Board's bargaining

> order remedy where the only unfair labor practice shown was the threat of plant closure. Here, in addition to the same unlawful threat, the Respondent retaliated against the protected concerted activity of its employees by discharging two of the five employees in the unit. The pervasive effect of such egregious violations cannot be gainsaid. For whether the unit is large or small the discriminatory discharge of 40 percent of the bargaining unit employees demonstrates most convincingly that the Respondent has resorted to its ultimate weapon in thwarting the employees' exercise of protected statutory rights. [Footnotes omitted.]

Thus, *Ludwig* stands for the proposition that the Board will, in a proper case, enter a bargaining order where, as here, the only significant unfair labor practice is a threat of plant closure. In *Ludwig,* the additional 8(a)(3) violation tipped the balance.

The Board also reversed an Administrative Law Judge's recommendation in *Ann Lee Sportswear, Inc.,* 220 NLRB 982 (1975). *Ann Lee* involved only one relatively minor 8(a)(3) violation. It is, for all practical purposes, a case in which the Board deemed 8(a)(1) violations—those found by the Administrative Law Judge as well as additional violations found by the Board—so serious that only a bargaining order would remedy the situation. It said:

> That the above unfair labor practices of Respondent had an irremediable effect on free expression appears plain. On June 7 the Union had obtained valid authorization cards from 13 of the 20 employees in the appropriate unit. Yet, when the election was conducted a month later, only 5 employees voted for, and 13 voted against, the Union.

> The majority support once established by the Union was dissipated as a result of Respondent's numerous violations of the Act which began immediately after the Union made its demand for recognition on June 7. The threats, the promise of benefits, the granting of benefits, the polling of employees, the interrogation of employees regarding their union interest, and the discriminatory refusal to promote and transfer employees because of the presence of the Union directly threatened the employment status of employees. Conduct of this nature cannot easily be erased from the minds of employees and its impact is lingering.

What tipped the balance was the fact that only 5 of 13 employees who saw fit, for whatever reason, to sign an authorization card were sufficiently unaffected by the employer's unfair labor practices to cast their ballots for a union. The union lost 60 percent of its supporters. Here, the Union obtained 133[10] authorization cards. It polled 113 votes. Thus, even if the assumptions are made that all 133 persons who placed their names on the Union's authorization cards did so because they wanted representation and that all 20 of those who changed their minds were coerced into doing so by Respondent's unfair labor practices, Respondent dissipated only 15 percent of the Union's majority. The impact of unfair labor practices of such limited effectiveness is not sufficiently lingering to justify a finding "that the possibility of erasing the effects . . . and . . . ensuring a fair . . . rerun . . . by the use of traditional remedies,

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10. One more than the 132 cards relied on by the General Counsel to prove majority. No effort was made to authenticate one card which was initially marked for identification.

though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order."

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[11]

Respondent, Hedstrom Company, a subsidiary of Brown Group, Inc., Bedford, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening to close its Bedford, Pennsylvania, plant if employees select a collective-bargaining representative.

(b) Threatening employees with any other reprisals.

(c) Promising employees benefits if they refrain from selecting a collective-bargaining representative.

(d) Soliciting grievances from employees in order to deter them from selecting a collective-bargaining representative.

---

11. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(e) Interrogating employees about their union activities, membership, and desires.

(f) Creating an impression of surveillance of employees' union activities.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Post at its plant in Bedford, Pennsylvania, copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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12. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges Respondent violated Section 8(a)(1) of the Act at times and/or in ways not specifically found herein.

APPENDIX F

Subsidiaries and Affiliates of Corporate Petitioner

Hedstrom Company (now incorporated as Hedstrom U.S.A., Inc.) is a wholly owned subsidiary of Brown Group, Inc. Hedstrom itself has two wholly owned subsidiaries: Hard Sails, Inc. and O.S.I. of Canada, Ltd.

The following are also wholly owned subsidiaries of the parent corporation, Brown Group, Inc.: Alpha Components Company; Barnes and Company of Midland, Texas; Bendheim's, Inc.; Bendheim's Mart, Inc.; Brobeck Shoe Company, Inc.; Brown Retail Development Company; Brown Shoe Company of Canada, Ltd., Brown Transnational, Ltd.; Cloth World, Inc.; Confare Shoe Company, Ind.; Corbat's Boot Shop, Inc.; Corbat's of Colonie, Inc.; Eagle Rubber Co., Inc.; Faflik Shoes, Inc.; H & A Shoe Company; Italia Bootwear, Ltd.; MLM Enterprises, Inc.; Meis of Illiana, Inc.; Meis Management, Inc.; Peoria Wohl Shoe Company; Robert's Footwear, Inc.; Sam Cohen Shoe Company, Inc.; Shelbro, Inc.; Shoeland, Inc.; Shoeland Jackson, Inc.; Shoeland Lansing, Inc.; The Leather Factory, Inc.; The W. G. Products Company of California; The W. G. Products Company of Virginia; Worhes Southgate, Inc.; W. G. Products Northwest Company; Wetherby-Kayser Shoe Company; Wetherby-Kayser Shoe Company of Arizona; Wetherby-Kayser Shoe Company of Missouri; Wohl Shoe Com-

pany; Wohl Shoe Company of Birmingham; Wohl Shoe Company of Dallas; Wohl Shoe Company of Georgia; Wohl Shoe Company of Grand Rapids, Inc.; Wohl Shoe Company of Miami; Wohl Shoe Company of Michigan; and Wohl Shoe Company of Scranton.

Brown Group, Inc. also own portions (as indicated in parenthesis) of the following corporations: Denver Shoe Company (75½%); Hickory Shoe Company, Inc. (75½%); and Waterlac Corporation (35½%).

No. 80-1135

In the Supreme Court of the United States

OCTOBER TERM, 1980

HEDSTROM COMPANY, A SUBSIDIARY OF BROWN GROUP, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTION PRESENTED

Whether the Board reasonably concluded that petitioner's violations of the National Labor Relations Act, which included both extensive threats of plant closure and numerous other unfair labor practices, precludes the holding of a fair representation election and therefore warranted the issuance of a bargaining order based on authorization cards.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-45a) is reported at 629 F. 2d 305. The Board's supplemental decision and order on remand (Pet. App. 92a-107a) and the Board's decision and order in a related case (Pet. App. 46a-91a) are reported respectively at 235 N.L.R.B. 1193 and 235 N.L.R.B. 1198. The opinion of the court of appeals (Pet. App. 108a-141a) remanding the Board's original decision and order is reported at 558 F. 2d 1137. The Board's original decision and order (Pet. App. 142a-221a) are reported at 223 N.L.R.B. 1409.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1980. The petition for a writ of certiorari was filed on January 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are as follows:

> 1. Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *.
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> 2. Section 8(a) It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
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> * * * * *

(5) to refuse to bargain collectively with the representatives of his employees * * *.

3. Section 10(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in [an] unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *.

4. Section 10(e) * * * No objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances * * *.

STATEMENT

1. In early 1974, the Union[1] waged an organizational campaign at petitioner's plant in Bedford, Pennsylvania, and obtained signed authorization cards from 128 of the plant's 249 employees. On March 28, 1974, the Union lost a Board representation election at the plant by a vote of 125 to 113 (Pet. App. 2a, 148a).

In an ensuing unfair labor practice proceeding, the Board held that, prior to the election, petitioner committed a total of 42 unfair labor practices to undermine the Union's support, in violation of Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1). The Board found that, in incidents involving a

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[1]International Association of Machinists and Aerospace Workers, District No. 98, AFL-CIO.

total of 18 employees, Plant Manager William Griffiths unlawfully interrogated employees, solicited grievances from employees, promised and granted benefits to employees, and threatened employees with plant closure (Pet. App. 2a-3a, 144a-145a, 171a-187a). The Board also found that, in incidents involving a total of 16 employees, nine plant supervisors unlawfully interrogated employees, solicited grievances from employees, promised benefits to employees, conveyed impressions of surveillance to employees, warned employees of an impending Union strike call, and threatened employees with reduced benefits, more onerous work rules, discharge, and plant closure (*id.* at 3a, 144a-145a, 187a-205a). The Board further found that, within the two days preceding the election, Company President Lee Ketcham impliedly threatened all of the employees with plant closure by referring to petitioner's "unhappy experience" with the Union at its former plant in Fitchburg, Massachusetts, and that Ketcham's implied threat was reinforced by a local newspaper story on the day of the election stating that petitioner's "bitter experience" with the Union at Fitchburg had caused that plant to close (*id.* at 3a, 144a-145a, 163a-168a, 206a-211a). Finally, the Board found that Ketcham unlawfully threatened an employee with discharge and that petitioner unlawfully refused to recognize and bargain with the Union (*id.* at 3a, 145a-146a).

Applying this Court's decision in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), the Board concluded that petitioner's "extensive and far-reaching" unfair labor practices required the election to be set aside, that there was "little or no likelihood" of holding a fair rerun election, and that issuance of a bargaining order based on the Union's authorization card majority was warranted (Pet. App. 3a-4a, 146a-153a).

2. On the company's petition for review, the court of appeals upheld all of the Board's unfair labor practice findings except the findings that Ketcham unlawfully threatened

an employee with discharge and that petitioner unlawfully refused to recognize and bargain with the Union (Pet. App. 4a, 114a-130a). With respect to the question of relief, the court remanded the case to the Board for reconsideration of the need for issuance of a bargaining order because (1) the Board had failed to make "specific findings" and a "detailed analysis" concerning the continuing effect of petitioner's unfair labor practices, the likelihood of recurrence of those unfair labor practices, and the possibility of holding a fair rerun election; (2) two of the Board's unfair labor practice findings had been overturned by the court; and (3) the Board had failed to assess the impact of the election day newspaper article and the intervening passage of time on the possibility of holding a fair rerun election (*id.* at 4a, 135a-141a).

3. In its supplemental decision and order on remand, the Board, again applying this Court's *Gissel* decision, specifically concluded "that 'the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, [was] slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order * * *' " (Pet. App. 101a, quoting 395 U.S. at 614-615).

As to the seriousness and continuing effect of petitioner's unfair labor practices, the Board determined (Pet. App. 99a-101a):

> [W]e note at the outset that the possibility of plant closure in the face of unionization was an issue which loomed large in the election campaign. The Board has long held that the threat of job loss through plant closure has a seriously coercive effect on employees' freedom of choice in the election of a collective-bargaining representative. * * *

> Further, in *Gissel*, * * * the Supreme Court recognized the serious impact of such threats when it made reference to a study which showed that threats to close or transfer plant operations were more effective in destroying election conditions for a longer period of time than were other types of unfair labor practices [citing *Gissel*, *supra*, 395 U.S. at 611 n.31].
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> [Petitioner's] employees were exposed to the threat of plant closure throughout the campaign. * * * [Both] high- and low-level supervisors unlawfully raised the Fitchburg example to the employees during the campaign, and impliedly threatened Bedford employees with the same fate in the event that they selected the Union. Indeed, [petitioner's] president, Ketcham, ended the campaign with a speech to all employees which raised the spectre of the "unhappy experience" at Fitchburg.
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> In addition, [petitioner's] intensive antiunion campaign included approximately 40 unfair labor practices, demonstrating [petitioner's] willingness to exceed the limits of the law in its attempt to prevent unionization. It may reasonably be inferred that the total effect of the threats of closure, and the numerous other unfair labor practices against the background of the general awareness of the Fitchburg experience, was to instill in employees a strong fear of loss of employment that would continue to be operative even in the event of a second election.

With respect to the rejection of two of its unfair labor practice findings by the court of appeals, the Board concluded (Pet. App. 101a, 104a-105a):

> [Our] conclusion is not significantly affected by the reviewing court's reversal of our finding that President

> Ketcham violated Section 8(a)(1) by threatening to fire an employee. The reversal does not disturb any of the findings concerning the threats of plant closure, or the overall context in which those threats occurred, which form the basis for our conclusion that a bargaining order is warranted.
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> The court's conclusion with respect to the violation [of Section 8(a)(5)] was based upon the fact that the Union demanded recognition 3 days before it achieved majority status and made no further demand after achieving such status. * * * As a result of the court's finding, we are presented with a case where no effective demand for recognition was made and where a bargaining order is nevertheless required to remedy the effects of [petitioner's] unfair labor practices. We shall therefore issue an order in accordance with our established practice in such cases.

Regarding the newspaper article, the Board, while stressing that issuance of a bargaining order would be warranted even without the article (Pet. App. 100a n.9), found (*id.* at 100a-101a):

> [The article] appeared on the morning of the election and recounted the Fitchburg experience and suggested that [petitioner's] expansion plans might be adversely affected by the presence of a union on the scene. Thus, the fears engendered by the implied threats of company officials and supervisors were articulated in an article published by an independent source. This article would tend to reinforce the employees' belief that [petitioner's] threats were not merely campaign rhetoric, but serious admonitions regarding the consequences of unionization.
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> [The employees'] strong fear of loss of employment * * * could only have been exacerbated by the publication of the newspaper editorial.

As to the effects of the passage of time, the Board concluded (Pet. App. 103a-104a):

> [T]he effect of [petitioner's] threats of plant closure and its extensive unfair labor practices during the course of the campaign was to instill in employees the fear that they would lose their jobs through plant closure if the Union won the election. There is nothing to indicate that this fear has been erased during the past three years. To the contrary, recent events indicate that [petitioner's] vigorous opposition to the Union continues to result in unfair labor practices, thereby sustaining, reinforcing, or increasing the fear that [petitioner] might still carry out its earlier threat to close operations if the Union prevails. Thus, in a [related] case issued this day,[2] we find that [petitioner] violated Section 8(a)(3) and (1) of the Act by terminating employee Ritchey, a union member who participated in and actively supported the Union's strike against [petitioner], at a time when she had been neither provided with an adequate offer of reinstatement nor permanently replaced after the strike ended. In addition, [petitioner is] found to have violated Section 8(a)(1) through Plant Manager Griffiths' interrogation and solicitation of grievances of an employee, and through Foreman Ferguson's threat that an employee had no job and that the strike was futile because the Union would never get a contract. Finally, we [find] that

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[2] *Hedstrom Company*, 235 N.L.R.B. 1198 (1978) (Pet. App. 46a-101a). This case involves unfair labor practices committed by petitioner during and after a strike called to protest its refusal to comply with the Board's first bargaining order.

> [petitioner], through President Ketcham, violated Section 8(a)(1) by threatening employee England with more onerous work conditions as a result of her participation in the strike. In these circumstances, we find that a bargaining order is still necessary despite the passage of time from the date of [petitioner's] earlier unlawful conduct.

4. The court of appeals, sitting en banc, enforced the Board's supplemental decision and order.[3] The court held that the Board, "[o]n the basis of * * * specific findings and after careful consideration of the record on remand," had reasonably exercised its "broad discretion" in concluding "that a bargaining order was still necessary to protect the rights of [petitioner's] employees" (Pet. App. 14a). The court explained (*id.* at 14a-15a):

> In our view, this appeal has all of the elements that * * * are common to those cases in which we have enforced orders to bargain. [Citations omitted.] To begin with, the implied threats at issue were communicated to a "significant percentage of employees in the bargaining unit." [Citations omitted.] Indeed, Company President Ketcham's implied threat of plant closure was made at a meeting involving every Hedstrom employee. Moreover, the unfair labor practices at issue "involved unlawful activity by senior company officials." [Citations omitted.] And, because the findings rest "ultimately on a psychological impact on all the employees that is unlikely to dissipate, the factors undermining the first election would be present at any future election." [Citation omitted.] In addition, the imposition of a bargaining order has been held "especially appropriate" where, as here, "the employer has

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[3]The court also enforced the Board's decision and order in the related unfair practice case against petitioner (see note 2, *supra*).

> demonstrated a history of opposition to unionization, thus suggesting that he will commit more unfair labor practices in a subsequent election campaign, and * * * the employer has engaged in a discriminatory refusal to recall an employee, thus indicating that his anti-union animus is responsible at least in part for the employee turnover." [Citation omitted.]

The court rejected petitioner's contention that the Board should have considered the effect of subsequent events, such as employee turnover, on the need for a bargaining order. The court first found that the issue was not properly raised on appeal (Pet. App. 15a-16a):

> [Petitioner] itself proffered no evidence, no statements, nor additional briefs in the more than nine months that the case was pending before the Board after this Court's remand on July 5, 1977. Nor did [petitioner] move for reconsideration or for leave to adduce additional evidence after the Board issued its decision on remand on April 28, 1978, as permitted by Board Rules and Regulations * * *. Under the circumstances, we find that [petitioner] is thus precluded from asserting this objection on appeal [under Section 10(e) of the Act,] 29 U.S.C. §160(e) * * *.

The court also concluded that petitioner's contention concerning subsequent events was without merit (*id.* at 16a-17a):

> [T]o require the Board to determine whether a continuing majority supports unionization would be "to put a premium upon continued litigation by the employer." [Citation omitted.] For an employer, particularly one with a rapid turnover rate, could hope that the resulting delay would produce a new factual situation which

the Board would then have to consider. In this manner, the employer would be able to avoid any bargaining obligation indefinitely.[8]

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[8] * * * * *

Although substantial employee turnover may well be relevant to the Board's choice of remedy, "the Board may determine that other considerations, such as 'past union activity, employer responses to such activity, and expressions of employee sentiments such as the signing of union cards,' * * * requires the imposition of a bargaining order even when substantial turnover has occurred." [Citation omitted.]

ARGUMENT

In issuing a bargaining order based on authorization cards to remedy petitioner's unfair labor practices, the Board properly applied to the particular facts of this case the principles established by this Court in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). Accordingly, further review is unwarranted.[4]

There is no merit to petitioner's contention (Pet. 7-9) that the Board adopted "a *de facto per se* rule" that threats of plant closure "automatically" call for issuance of a bargaining order based on pre-election membership cards of a majority of employees in the unit. The Board specifically found that a bargaining order was warranted in this case, not only because of petitioner's threats of plant closure, but also because of "the total effect" of petitioner's "numerous other unfair labor practices" (Pet. App. 101a); and the court of appeals concluded that the Board's "specific findings"

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[4] Contrary to petitioner's suggestion (Pet. 8-9), the fact that the administrative law judge concluded that issuance of a bargaining order was not warranted in this case is of no special significance. This Court has stated that, when the administrative law judge and the Board draw different legal conclusions from the same set of facts, the administrative law judge's conclusions are entitled to no "more weight than in reason and in the light of judicial experience they deserve," and the standard of

reflected "careful consideration" of the entire record (*id.* at 14a). Moreover, in *Sinclair Co.* v. *NLRB*, a case decided together with *Gissel*, this Court upheld the Board's issuance of a bargaining order based solely on threats of plant closure (395 U.S. at 587-590, 616-620).[5]

There is also no merit to petitioner's contention (Pet. 12-15) that review by this Court is warranted because the Board should have considered the need for a bargaining order in light of the effect of subsequent events such as employee turnover. Since petitioner never raised this issue before the Board, the court of appeals correctly held (Pet.

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review "is not modified in any way." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 476 (1951). Accord: *FCC* v. *Allentown Broadcasting Co.*, 349 U.S. 358, 364-365 (1955).

[5]The Board cases that petitioner contends (Pet. 9-10) conflict with the instant case are distinguishable. In *Coach and Equipment Sales Corp.*, 228 N.L.R.B. 440 (1977), *Florida Steel Corp.*, 223 N.L.R.B. 174 (1976), and *Reeves Distribution Services, Inc.*, 223 N.L.R.B. 995 (1976), there was no finding that the unions had obtained majority support and the propriety of a bargaining order was not even discussed in those cases. In *Allen-Stone Boxes, Inc.*, 252 N.L.R.B. No. 171, 105 L.R.R.M. 1381 (Sept. 30, 1980), the employer's threat of plant closure was made early in the election campaign, was dissipated by subsequent action of the Board's Regional Office, was made only once, was never made explicit, and was combined with only four other unfair labor practices. In *Ludwig Motor Co.*, 222 N.L.R.B. 635, 646-647 (1976), the employer's threat of plant closure was made only once, was not expressly stated, and was accompanied by no other unfair labor practices.

In addition, petitioner incorrectly claims (Pet. 11) that the Board misapplied *Gissel* by basing the issuance of a bargaining order in part on a newspaper's election day references to plant closure. In finding that the newspaper's references to plant closure tended to "reinforce" and "exacerbate" the effect of petitioner's own threats of plant closure (Pet. App. 100a-101a), the Board properly applied *Gissel's* teaching that it should determine the need for a bargaining order by considering "the extensiveness of an employer's unfair practices" in terms of their overall "effect on election conditions" (395 U.S. at 614). In any event, the Board specifically found that a bargaining order would be warranted even without regard to the newspaper's references to plant closure (Pet. App. 100a n.9).

App. 15a-16a) that judicial review of the contention is precluded under Section 10(e) of the Act, 29 U.S.C. 160(e). See *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).[6] In any event, petitioner's proffered evidence would merely show (Pet. 12 n.12) that there has been a 44% turnover of employees and expansion of the plant, rather than closure, since petitioner's unfair labor practices in 1974. This evidence, even if relevant, would not be sufficient to negate the Board's finding that the 1974 unfair labor practices—which were committed during the tenure of nearly 140 employees still working at the plant, were spread by the election day newspaper article to potential new employees in the community, and were reinforced by the subsequent 1976 unfair labor practices at the plant—still warrant issuance of a bargaining order.[7]

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[6]Contrary to petitioner's claim (Pet. 12 n.13), its failure to raise the contention concerning subsequent events before the Board is not excused on the ground that such a contention "would have been futile in light of the Board's explicit position that such evidence is irrelevant and will not be considered." This Court has rejected the proposition that failure to raise an objection before an agency is excused by the existence of "a predetermined policy * * * which would have required [the agency] to overrule the objection if made," since "[r]epetition of the objection in [a large number of like cases] might lead to a change of policy, or, if it did not, * * * would at least * * * [put the agency] on notice of the accumulating risk of wholesale reversals being incurred by its persistence." *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37 (1952).

[7]Petitioner cites (Pet. 13-14) a number of cases in which courts of appeals have held that the Board should consider the effect of subsequent events on the need for a bargaining order. However, the cited cases in no way indicate that consideration of subsequent events would require reversal of the Board's issuance of a bargaining order in the circumstances of this case. On the contrary, *NLRB* v. *Dixisteel Buildings, Inc.*, 445 F. 2d 1260, 1265 (8th Cir. 1971), recognizes that in cases where the employer has committed major unfair labor practices such as

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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threats of plant closure, subsequent events, "while a relevant consideration * * *, cannot be deemed dispositive"; and *NLRB* v. *Jamaica Towing, Inc.*, 632 F. 2d 208, 212-213 (2d Cir. 1980), states that in cases where the employer has committed "hallmark" unfair labor practices such as threats of plant closure, subsequent events need not be considered at all. The cited cases are thus not inconsistent with the position of the court of appeals in this case that "[a]lthough substantial employee turnover may well be relevant * * *, 'the Board may determine that other considerations, such as past union activity, employer responses to such activity, and expressions of employee sentiment such as the signing of union cards' * * * requires the imposition of a bargaining order even when substantial turnover has occurred" (Pet. App. 16a n.8; citations omitted).